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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

SEARCY M. FERGUSON, JR.,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1: May a federal court of appeals apply "federal common law" or a "federal rule of decision" on the issue of an FDIC employee's capacity and authority to bind a federal agency to a settlement agreement even if no federal statutory policy conflicts with the application of state law or warrants a federal rule?

QUESTION NO. 2: May the FDIC as receiver settle a claim under false pretenses for less than the full amount, receive payment, then switch to its corporate capacity, disavow the settlement and releases under a claim of federal common law, and sue for the difference between the settlement and the debt?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Searcy M. Ferguson, Jr., and respondent Federal Deposit Insurance Corporation, in its Corporate Capacity as Liquidator of the Union Bank & Trust. The designation of the Federal Deposit Insurance Corporation, in its capacity as Receiver for the Union Bank and Trust, was changed after April 29, 1993, when the FDIC as Receiver moved to restyle the case after having earlier been denied such permission on October 5, 1992.

("FDIC") For the sake of clarity, we refer throughout this petition to respondent as the "FDIC".

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Petitioner Searcy M. Ferguson, Jr. respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this matter and that such decision be summarily reversed.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reprinted in the appendix hereto at 1a - 14a. The U.S. District Court's Memorandum Opinion and Order of February 12, 1996 and November 12, 1993 and are reprinted in the appendix hereto at appendix B and appendix C.

JURISDICTION

The Fifth Circuit issued its decision on January 6, 1999. A timely petition for rehearing was denied on March 8, 1999. This petition is filed within ninety days of that date and is thus timely. Sup. Ct. Rule 13.1 This Court has jurisdiction pursuant to 28 U.S.C. 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Facts. Petitioner owed a state bank nine debts shown by separate notes. The bank failed and the notes fell under the jurisdiction of the FDIC as receiver. Petitioner had a bona fide dispute with the bank regarding his collateral. (App. at 122a). The FDIC had written on May 7, 1988 that it now owned the notes "as Receiver." (App. at 158a). Petitioner's funds were in the possession of petitioner's escrow holder. Under a written contract with petitioner, the escrow holder was to use the funds to pay all nine notes. The FDIC told the escrow holder that a settlement agreement covering all notes had been reached and arranged for payment. The FDIC stipulated that a settlement occurred. (App. at 49a). The escrow holder prepared the paperwork, then sent it and the payment to the FDIC. The releases described the FDIC "as Receiver". The documents stated that the payment was to be made on two conditions: it was in full settlement of all nine notes and on condition that an authorized person signed the releases. (App. at 132a). By conduct and later documents, the FDIC accepted the conditions. The FDIC kept the money. On its behalf, the releases were signed by FDIC's Anna Croteau, who wrote her name and title on the releases. She testified she was a senior member of the FDIC's Credit Committee. (App. at 104a). The releases were signed by the FDIC "as Receiver". (App. at 135a). The FDIC had no interest in starting over. (App. at 106a,107a). Importantly, FDIC's internal authority memo had valued its first lien collateral (701 acres) at $1,500,000, or the approximate amount of the large check tendered.

Some time later, Petitioner became involved in a another dispute with the FDIC and sued the FDIC as "Receiver". As "Receiver", the FDIC counterclaimed for the difference between the settlement payment and the total of the

nine notes. (App. at 82a). On April 29, 1993, almost five years after the settlement agreement, payment and release, the FDIC moved to amend the caption of the case to change its capacity from "Receiver" to "Corporate". (App. at 78a). In that application, the FDIC represented to the Court in writing:

> *"The requested change in the style of this case has no substantive impact on any of the issues litigated herein. At no past, present or future time in this litigation, based upon the issues as raised in the pleadings on file and sought to be filed, will the distinction between the FDIC and its corporate and receivership capacities have any impact on the outcome of this case." (Emphasis added.)*

The Court granted the application. The Court had previously denied the FDIC's motion on November 9, 1992. (App. at 74a).

The District Court. In 1996, the FDIC moved for summary judgment on the ground that the person who signed the releases was not authorized to bind the FDIC in its corporate capacity, and that the settlement was void for lack of authority. During these proceedings, the FDIC offered evidence that, at least internally, it had operated in its "corporate" capacity. During a 1999 jury trial on damages, its witness (Henderson) admitted he had been instructed to backdate his documentary evidence. (App. at108a). The FDIC internal authority memo dated November 9, 1988 used to support their contention was backdated as it contained a fact which the FDIC had no knowledge until later. (App. at 117a). On the issue of capacity and authority the district court applied a federal rule of decision, dismissed petitioner's

well pleaded state law defenses of estoppel, ratification, etc., granted summary judgment to the FDIC and entered judgment for the FDIC. The district court concluded "that the authority issue is determative". (App. at 23a). The court expressed some concern about O'Melveny's possible impact. (App. at 36a).

The Court of Appeals. The Fifth Circuit affirmed. It held that, because the FDIC had been proceeding in its "corporate" capacity, "federal common law governed the authority issue", and that petitioner's state law defenses were not viable. In practical effect, the Court held that the FDIC could misrepresent its capacity in any way it chose, could settle on false pretenses, and could charge a careful but unsuspecting member of the public with knowledge of unpublished internal FDIC policies, and could switch its capacity whenever it wished to change the substantive law. The Fifth Circuit denied a petition for rehearing. (App. at 76a).

REASONS FOR GRANTING THE PETITION

The central issue in this case is whether the FDIC's capacity solely determines whether to apply federal common law or state law when, as the case here, there is absolutely no significant conflict between some federal policy or interest. If the FDIC can switch its identity whenever it wants to disregard well-developed principles of state law, then O'Melveny, supra, has a very big loophole. Obviously, the FDIC feels it is fair to use capacity to determine what the law should be or whatever gets them the greatest recovery. Surely the Fifth Circuit's approach is fundamentally wrong, O'Melveny was misinterpreted. This Court's manifest intent was not to permit the FDIC to dictate the rule of decision and

preempt an individual's expectation that his rights and obligations would be governed by state law standards. Kamen v. Kemper Fin. Servs., Inc., 111 S. Ct. 1711, 1717 (1991).

I. WHAT RULE OF DECISION SHOULD GOVERN ORDINARY CASE MATTERS FOR THE FDIC ACTING IN ITS CORPORATE CAPACITY?

"There is no federal general common law." Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), "common law" being the judicial "creation" of a special federal rule of decision. Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-643 (1981). "[C]ases in which judicial creation of a special federal law would be justified [are] . . . 'few and restricted.'" O'Melveny and Myers v. FDIC, 512 U.S. 79, 87 (1994); Atherton v. FDIC 117 S. Ct. 666 (1997); Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963) "'Whether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not for the federal courts." Atherton v. FDIC, 117 S. Ct. 666 U.S. (1997); Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966). Generally, federal common law is the rule of decision only when necessary to protect a federal statutory policy that a state rule of decision would jeopardize. O'Melveny, supra 512 U.S. 67 75; FDIC v. Raffa, 935 F. Supp. 119, 125 (D. Conn. 1995).

When the FDIC acts in its capacity as a receiver, state law governs its activities. O'Melveny, supra; Atherton, supra. On the rules of decision for the FDIC acting in its corporate capacity, this Court expressly limited its decision in O'Melveny, supra, to the FDIC as receiver, [512 U.S. 80-81] and has not addressed the question of the FDIC as corporate.

The rules of decision adopted by the district and circuit courts for "FDIC Corporate" both before and after O'Melveny produced a blizzard of conflicting, confusing, contradictory, and (worst of all) unpredictable tests. They include:

(a) state law, FDIC in its corporate capacity v. Wollard, 889 F. 2 1477, 1479 n.3] (5th Cir. 1989);

(b) state law under a contractual choice of law clause, FDIC in Bank of America National Trust and Savings Assoc., 701 F. 2d 831 (9th Cir. 1982);

(c) in claim transferred to FDIC Corporate, state common law, RTC v. Platt, F. Supp. (S.D. Ill. 1992);

(d) state common law, FDIC v. Cherry, Bekaert & Holland, 742 F. Supp. 612, 613 (M.D. Fla. 1990);

(e) state common law, FDIC in its corporate capacity v. Jenkins, 888 F. 2d 1537 (11th Cir. 1989);

(f) state common law, FDIC v. Booth et al, 955 F. Supp. 651 (M.D. La. 1996);

(g) state common law governs settlement because it has no "specific", "concrete", and "specific conflict" with federal policy, FDIC v. Booth et al, 955 F. Supp. 651 (M.D. La. 1996);

(h) federal common law, defined as "general principles of common law, [including] state law to the extent it is consistent with general principles of federal common law, and . . . pertinent case law from other circuits ." FDIC v. Guinn, 948 F. 2d 233, [page 236] (6th Cir. 1991);

(i) federal law, Citizens State Bank of Lometa v. FDIC, 947 F. 2d 408 (5th Cir. 1991);

(j) state law, FDIC v. Carter, 701 F.Supp. 730 (C.D. Cal. 1987);

(k) federal law, but state law if neither party raises federal law, FDIC v. World University, Inc. et al, 978 F. 2d 10 (1st Cir. 1992);

(l) federal common law, FDIC v. Healy, et al, 991 F. Supp. 53 (D. Conn. 1998);

(m) federal common law, Trigs v. FDIC, 847 F. 2d 1499, 1502 (11th Cir. 1988).

During the period 1980 to 1999, the FDIC was involved in various reported decisions. The law that covers its conduct has been litigated repeatedly, reaching this Court twice in this decade alone. O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994); Atherton v. FDIC, 117 S. Ct. 666 (1997). In many proceedings, it was involved in both its receiver (state law) and corporate capacity, and it often showed the ability to move assets and claims, as it did here, from one capacity (one law) to another (a different law). FDIC v. Godshall, 558 F. 2d 220 (4th Cir. 1977); Freeling v. Sebring, 296 F. 2d 244 (10th Cir. 1961); FDIC v. Berry, 659 F. Supp. 1475 (E.D. Tenn. 1987).

Relying on the FDIC's post 1988 settlement and recently announced corporate capacity, the Fifth Circuit applied a judge-made federal rule of decision and barred the defenses available under the laws of the State of Texas (ratification, estoppel, waiver, etc.) on capacity and authority. This conflicted with the holdings of, and rejected the rules of

decision required by, Erie Railway v. Tompkins, 304 U.S. 64 (1938); FDIC v. O'Melveny & Myers, 512 U.S. 79 (1984); and Atherton v. FDIC, 117 S.Ct. 666 (1997). That kind of forum shopping, one of the dominant reasons for the decision in Erie, supra, 304 U.S at 75-76, ought not to be permitted in a properly organized federal system. Among other things, uniformity of treatment of a claim, the antithesis of forum shopping, is one of the reasons for the existence of conflict of law rules, 28 U.S.C. §1407, 28 U.S.C. §1404(a) and other principles intended to achieve uniformity and predictability in the resolution of a particular claim and similar claims. Even if the rule of decision were to vary from state law to state law, the principle for identifying the rule of decision should be uniform; and the FDIC should not be permitted to change the rule of decision by passing the claim, at its discretion, from FDIC receiver to FDIC corporate.

II. MAY THE FDIC AS RECEIVER SETTLE A CLAIM UNDER FALSE PRETENSES FOR LESS THAN THE FULL AMOUNT, RECEIVE PAYMENT, THEN SWITCH TO ITS CORPORATE CAPACITY, DISAVOW THE SETTLEMENT AND RELEASES, AND SUE FOR THE DIFFERENCE BETWEEN THE SETTLEMENT AND THE DEBT?

In all its dealings with Petitioner in 1988, the FDIC held itself out as "FDIC-receiver". The FDIC accepted the settlement payment from a member of the public on the condition that it acted as receiver, signed binding settlement papers as receiver, consented by action to the express condition that it acted as receiver, sued and defended as receiver.

Five years later, the FDIC elected to change its capacity to "corporate", after being first denied permission (App. at 74a), the FDIC obtained permission from the district court to change its capacity from "receiver" to "corporate" on the express representation in writing that the change would affect no substantive rights, then argued in the Fifth Circuit that the settlement agreement was invalid because the FDIC acted in its "corporate" capacity and federal common law changed the rule of decision on the validity of the settlement. Without any question whatsoever, the FDIC blatantly mislead the federal district judge. No faulty memory and kin to judicial estoppel. (App. at 162a)

Under the philosophical guise of the worst form of caveat emptor, buyer beware, assumption of the risk, and/or chargeability with undiscoverable knowledge, the Fifth Circuit approved a remarkably low standard of conduct for the FDIC in its dealings with the public. The FDIC could lie, backdate documents and deceive. Petitioner dealt with the FDIC as "receiver" and the FDIC did everything it could to continue that belief. Even at the time of the settlement (before O'Melveny), the law was fairly clear that the FDIC acting as receiver was governed by state law. Bradford v. American Fed. Bank, F.S.B., 783 F. Supp. 283, 286 (5th Cir. 1991); FDIC v. Ashley, 749 F. Supp. 1065, 1067 (10th Cir. 1990); Trigs v. FDIC, 847 F.2d 1499, 1503 (11th Cir. 1988); Tosco Corp. v. FDIC, 723 F.2d 1242, 1247 (6th Cir. 1983); FDIC v. Braemoor Assocs., 686 F.2d 550, 553-554 (7th Cir. 1982).

But even if Petitioner had somehow foreseen that he would be forced to defend himself five years later against FDIC corporate, how could he have discovered who had authority to settle when the agency seemed intent on concealing that information? How could he have known that a member of the FDIC's Credit Committee could not bind the

FDIC? How could he have known that the documents he received from FDIC receiver were false? How could he have learned the unpublished fact when the FDIC conduct had the direct effect of concealing the facts and misleading him? Should this be the standard by which the United States government deals and makes contracts with its citizens? Is every citizen entitled to have complete confidence in the integrity of each federal employee?

To establish standards of ethics for employees of the executive branch, President Lyndon Johnson issued Standards of Conduct in Executive Order 11222, by on May 11, 1865, § 201(c)(6). Regulations were promulgated in 1965 under the title "Standards of Ethical Conduct for Employees of the Executive Branch." 5CFR 2635.101. As they apply here, they read as follows:

> (a) Public service is a public trust. ... To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section ...
>
> (b) (6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the government. [5 CFR 2635.101(a) and (b)(6)].

The FDIC is an "executive agency as defined in 5 U.S.C. 105." 5 CFR 2635.102(a) and 5 U.S.C. 105 and by supplemental regulations promulated by the FDIC itself, the FDIC is governed by the "Standards of Ethical Conduct." 12 CFR 336.1. Incorporated in the regulations are a number of Related Statutory Authorities, 5 U.S.C. 2635.901, one of

which is 18 U.S.C. 1001, 5 U.S.C. 2635.902(v), which prohibits falsification of a "material fact" in any "writing or document" and prescribes penalties (fines or jail). Even if the conduct does not directly violate these provisions, it will be "impermissible" if "it appears to the public to be a violation". [emphasis supplied] The provisions of the CFR and the USC cited here are all related to, or incorporated by reference in, the regulations issued under the original executive order. Executive Order No. 11222 (1965); Define Construction Co., Inc. v. U.S., 12 Ct. Cl. 56 (1987); Executive Order No. 12674 (1990).

The FDIC signed releases, accepted a payment in full settlement, represented throughout that it was proceeding in its capacity as receiver (in which case no federal common law rule would apply but the state law of ratification, etc., would), then altered documents, changed to "FDIC Corporate," and made the claim against Petitioner. This conduct conflicts with the ethical standards created by the executive order, the regulations published by the executive branch, and the FDIC's own regulations requiring ethical and honest conduct on which the public can rely. Of course, the "federal common law" applied by the Fifth Circuit conflicts with them. (App. at 11a-12a).

The conflict and the resulting question of standards of conduct as an agency of the executive branch should be resolved by this Court. In its most narrow application, a decision in favor of petitioner would apply to agreement of settlement for assets being handled by the FDIC after it had assumed control of a failed bank. If general standards of government conduct are important in a broader sense, the outcome could be much broader; but that sweep is not necessary to resolve an important federal issue.

CONCLUSION

For the reasons stated in this Petition, essentially conflicts in judicial determinations (Point I) and conflicts of federal regulations and federal statutes with "federal common law" (Point II), we respectfully request that this Court grant the petition on both questions or on either one. A ruling in Petitioner's favor on either issue would re-open the case and represent the opportunity for an entirely different outcome.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: January 6, 1999]

No. 97-10315
No. 97-10624

Appeals from the United States District Court
for the Northern District of Texas

SEARCY M. FERGUSON, JR.,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
FEDERAL DEPOSIT INSURANCE	)
CORPORATION, Etc., Et Al.,	)
Defendants,	)
	)
FEDERAL DEPOSIT INSURANCE	)
CORPORATION, in its Corporate	)
capacity as Liquidator of the	)
Union Bank & Trust,	)
Defendant-Appellee.	)
	)

OPINION

Before HIGGINBOTHAM, DAVIS, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKDSDALE, Circuit Judge.

As Appellant Searcy M. Ferguson, Jr. conceded at oral argument for this appeal, the disposition of this case hinges on the following issue: whether the agents of the Federal Deposit Insurance Corporation dealing with Ferguson had authority to enter into a global settlement of his indebtedness on numerous promissory notes. We **AFFIRM.**

I.

During the 1980s, Ferguson was a shareholder and officer of Union Bank and Trust. In 1986 and 1987, Ferguson borrowed several million dollars from Union Bank pursuant to nine promissory notes (the Nine Notes). Union Bank failed in 1988, and the FDIC was appointed receiver.

At that time, the Nine Notes were delinquent. In May 1988, the Nine Notes were transferred, pursuant to a contract of sale, from the FDIC *as receiver* to the FDIC in its *corporate capacity*.

In September 1988, Ferguson contacted Ronald Bieker, the FDIC assistant account officer assigned to Ferguson's account, regarding a settlement of the Nine Notes. The offer was rejected.

Also in September 1988, Ferguson contracted to sell property he owned in Kaufman County, Texas (the Kaufman Property), part of which served as part or all of the collateral for seven of the Nine Notes. Ferguson claims that he then offered to pay the FDIC $1.727 million from the Kaufman Property sale for a release of liens on the Kaufman Property *and* a global settlement of the Nine Notes; and that the FDIC accepted this offer.

The FDIC counters that Ferguson offered to pay $1.365 million (the principal and interest due on only one of the notes) in exchange for a release of the liens on the Kaufman Property; and that Ferguson also offered to pay the balances on two additional notes, for a total of $1.727 million for the three notes.

On 14 November 1988, Ferguson's escrow agent, by letter to the FDIC, provided three checks payable to the FDIC (totaling $1.727 million), as well as seven standard Texas release of lien forms for the Kaufman Property. Each release of lien form contained a covenant that the "holder of the note acknowledges its payment and releases the property from the lien". The releases were forwarded to Anna Croteau, Department Head of Commercial Loans at the FDIC and a member of the Senior Credit Review Committee. She executed the releases.

In February 1989, Ferguson attempted to settle the indebtedness on the remaining notes. The FDIC maintains that he did so because he was aware that he had only settled as to *three* of the notes. Ferguson, however, claims that he made the efforts only after the FDIC surprised him by claiming that what he understood to be a global settlement was

instead only a settlement on three of the notes and a release of the liens on the Kaufman Property. In any event, these subsequent negotiations failed.

In the fall of 1991, Ferguson filed this action in Texas state court, seeking, *inter alia*, a declaratory judgment that the FDIC received full payment through an accord and satisfaction or a novation, or that the FDIC was precluded from recovery based on estoppel, ratification, waiver, release, and failure of consideration. The FDIC removed this action to federal court, denied liability on Ferguson's claims, and counterclaimed for the indebtedness on the remaining six notes.

The FDIC moved for summary judgment on Ferguson's affirmative defenses of accord and satisfaction, novation, waiver, estoppel, failure of consideration, fraud, and ratification, based, among other things, on its contention that only the FDIC Credit Review Committee had the authority to approve a global settlement. In support of this claim, the FDIC submitted evidence that Bieker and Croteau lacked such authority.

On cross-motions for summary judgment, the district court ruled that the evidence submitted by the FDIC was not rebutted by Ferguson; and that it established that Bieker and Croteau did not have authority to negotiate a global settlement or release a note. Based on its lack of authority ruling, the district court granted summary judgment for the FDIC on Ferguson's defenses of accord and satisfaction, novation, waiver, estoppel, failure of consideration, fraud, and ratification.

Accordingly, only two issues were tried to the jury: (1) what amount the FDIC was entitled to recover on the remaining six notes; and (2) whether Ferguson established the affirmative defense that the FDIC failed to pay the six notes in accordance with his instructions. The jury found that Ferguson failed to prove this defense and, among other things, awarded principal and interest due the FDIC. The district court entered judgment for the FDIC for, *inter alia*, $520,797.

II.

Ferguson challenges three rulings by the district court: (1) the partial summary judgment in favor of the FDIC on the issue of authority; (2) the admission of parol evidence regarding the terms of the releases; and (3) the admission of evidence concerning the subsequent settlement negotiations. At oral argument, Ferguson conceded that, if he did not prevail on the authority issue, "the other two issues are really moot". Accordingly, because we conclude that Bieker and Croteau lacked authority to enter into a global settlement, we need not address the other two issues. (On motion by the FDIC, its cross-appeal was dismissed.)

For the authority issue, decided by summary judgment, we conduct the requisite *de novo* review. *E.g.*, ***Thompson v. Georgia Pacific Corp.***, 993 F.2d 1166, 1167 (5th Cir. 1993). Viewing the evidence in the light most favorable to the nonmovant, we will affirm "when the pleadings and evidence illustrate that no genuine issue exists as to any material fact and that the movant is entitled to judgment or partial judgment as a matter of law". ***Burns v. Harris County Bail Bond Board***, 139 F.3d 513, 517-18 (5th

Cir. 1998); ***Hogan Systems, Inc. v. Cybresource Int'l, Inc.***, 158 F.3d 319, 322 (5th Cir.), *rehearing and suggestion for rehearing en banc denied*, _ F.3d _ (5th Cir. 1998); ***Pollock v. FDIC***, 17 F.3d 798, 802 (5th Cir. 1994); *see* FED. R. CIV. P. 56. "To win summary judgment, the movant must show that the evidence in the record would not permit the nonmovant to carry its burden of proof at trial." ***Smith v. Brenoettsy***, 158 F.3d 908, 911 (5th Cir. 1998). To rebut this, the nonmovant may then present evidence showing that a material fact issue exists to be resolved at trial. ***Id.***; ***Burns***, 139 F.3d at 518.

A.

Ferguson first contends that the district court erred in applying federal, rather than Texas, law to his affirmative defenses (accord and satisfaction, novation, waiver, estoppel, failure of consideration, fraud, and ratification). Ferguson bases this claim on ***O'Melveny & Myers v. FDIC***, 512 U.S. 79 (1994), in which the Supreme Court held that, in an action by the FDIC, acting as receiver, in which the defendant raised the affirmative defense of imputation, the State's law controlled. ***Id.*** at 81-82, 86. Reminding that "[t]here is no federal general common law", ***id.*** at 83 (quoting ***Erie R. Co. v. Tompkins***, 304 U.S. 64, 78 (1938)), the Court noted that the FDIC had not identified any "significant conflict [between the use of state law and] some federal policy or interest", ***id.*** at 88 (quoting ***Wallis v. Pan American Petroleum Corp.***, 384 U.S. 63, 68 (1966)); and that the FDIC, because it was acting as receiver, was asserting the rights of the failed bank, rather than its own. ***Id.*** at 85.

In maintaining that ***O'Melveny*** requires the application of Texas state law here, Ferguson relies upon ***FDIC v. Massingill***, 30 F.3d 601 (5th Cir. 1994), and ***Davidson v. FDIC***, 44 F.3d 246, 250 (5th Cir. 1995), two post-***O'Melveny*** decisions addressing similar issues. Further, Ferguson asserts that there is no conflicting federal interest at stake to justify the use of federal law.

1.

The FDIC responds in part that Ferguson is precluded from presenting this issue, claiming that he failed to raise it in district court. Needless to say, we "will not address an argument raised by a party for the first time on appeal . . . unless it meets the plain error standard". ***Forbush v. J.C.Penney Co.***, 98 F.3d 817, 822 (5th Cir. 1996).

Obviously, Ferguson did not need to plead the applicability of Texas law in order to preserve this choice of law question. ***Kucel v. Walter E. Heller & Co.***, 813 F.2d 67, 74 (5th Cir. 1987). On the other hand, he did have "an obligation to call the applicability of another state's law to the [district] court's attention in time to be properly considered". ***Id***.

Although he should have more completely presented the applicability-of-Texas-law-issue, Ferguson did raise it in district court. Among other things, in his summary judgment motion, as well as in his response to the FDIC's, Ferguson supported his affirmative defenses with Texas law.

As Ferguson correctly notes, in both ***Davidson*** and ***Massingill***, our court recognized the import of ***O'Melveny***. ***Massingill***, 30 F.3d at 604, held that the defense of impairment of collateral in an FDIC collection action was controlled by state, rather than federal, law. And ***Davidson***, 44 F.3d at 249, held that the state statute of limitations applied to a deed of trust acquired by the FDIC as receiver before the enactment of one of the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1821(d)(2)(A)(i), Pub. L. No. 101-73, 103 Stat. 183 (1989). Our court noted, based on ***O'Melveny***, that the FDIC had not advanced a significant federal interest warranting displacement of state law through its argument that an adverse decision would have a general impact on the public fisc; and that the FDIC was acting in its capacity as a receiver when it acted, rather than in its corporate capacity. ***Id***. at 250, 252.

Thus, we are faced with whether Texas or federal law should be applied to the authority issue. Although the district court delineated alternative reasons why Ferguson's affirmative defenses failed, it stated that, as Ferguson concedes here, the authority issue was controlling. We agree with the district court that federal law applies to the authority issue.

Although ***O'Melveny*** disclaimed again the existence of a general federal common law and required the application of state law to claims made by or against the FDIC in its capacity as a receiver, it did not purport to overrule case law holding that the Government is not bound by the actions of

agents acting outside the scope of their authority.

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. . . . And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). "[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." ***Heckler v. Community Health Services***, 467 U.S. 51, 63 (1984). Moreover, both the Supreme Court and our court have held that, in most cases, the Government cannot be estopped based on unauthorized representations made by its agents. *See, e.g.*, ***Office of Personnel Management v. Richmond***, 496 U.S. 414, 432-33 (1990) (no estoppel against Government for payment of public funds); ***United States v. Perez-Torres***, 15 F.3d 403, 407 (5th Cir. 1994) (difficult to succeed in estopping Government based on representations of its agents, and "change in position in reasonable reliance on the misrepresentation" must be demonstrated); ***Fano v. O'Neill***, 806 F.2d 1262, 1265 (5th Cir. 1987) ("party seeking to estop the government bears a quite heavy burden").

Further, as stated in ***Davidson***, "[t]he Supreme Court has recently made clear [in ***O'Melveny***] that the capacity in which the FDIC acts may have a determinative impact on

whether a state or federal rule should control". ***Davidson***, 44 F.3d at 251. Here, Bieker and Croteau were acting as agents of the FDIC-Corporate. They derived their authority (if any) from the FDIC in its *corporate* capacity, because the FDIC-Corporate purchased the Nine Notes in May 1988, before any settlement negotiations between Ferguson and the FDIC began. *See* ***Beighley v. FDIC***, 868 F.2d 776, 779 n.7 (5th Cir. 1989) (FDIC as receiver sells assets of failed bank to FDIC as insurer, acting in its corporate capacity, and FDIC-Corporate then "attempts to collect on these assets to reduce loss to the insurance fund").

This is unlike the situation in ***O'Melveny***, in which the Court noted that "[t]he rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as *receiver*, with respect to primary conduct on the part of private actors that has already occurred". ***O'Melveny***, 512 U.S. at 88 (emphasis added). Here, it is the action of the Government agents and their authority to so act that is at issue, rather than the impact on the FDIC, acting as receiver, of imputing the prior acts of agents of the failed bank.

In ***Massingill***, 30 F.3d at 604, our court noted that applying federal law to the appellant's impairment of collateral defense would require the *creation* of a substantive federal common law rule of decision, which would run contrary to ***O'Melveny***. But here, the rule that the Government is not liable for the unauthorized acts of its agents has been long-established.

The case at hand is also distinguishable from ***Davidson***, 44 F.3d at 251, in which our court emphasized that

the FDIC was acting "in the limited capacity of receiver". Again, concerning the Nine Notes, the FDIC was acting in its *corporate* capacity as the holder of those notes.

Thus, the district court correctly applied federal law to the issue of whether Bieker and Croteau had authority to enter into a global settlement.

B.

The district court held also that Bieker and Croteau lacked authority to enter into a settlement. We agree.

On the cross-motions for summary judgment, the FDIC presented evidence that all settlements had to be approved by the Credit Review Committee. Ferguson presented no evidence that Bieker or Croteau were given the authority to enter into a global settlement, but instead based his claims upon their actions.

1.

Because Ferguson asserted affirmative defenses, he would have had the burden of proving them at trial. *See, e.g.*, ***Crescent Towing & Salvage Co., Inc. v. M/V Anax***, 40 F.3d 741, 744 (5th Cir. 1994); ***Fontetnot v. Upjohn Co.***, 70 F.2d 1190, 1194 (5th Cir. 1986). And, as stated, the Government is not bound by the unauthorized acts of its agents. *E.g.*, ***Richmond***, 496 U.S. at 419-20 ("Government could not be bound by the mistaken representations of an agent unless it were clear that the representations were within the scope of the agent's authority"); ***Heckler***, 467 U.S. at 63 ("Men must turn square corners when they deal with the

Government" (quoting ***Rock Island, A & L.R. Co. v. United States***, 254 U.S. 141, 143 (1920)); ***Merrill***, 332 U.S. at 383-84; ***Rosas v. United States Small Business Admin.***, 964 F.2d 351, 360 (5th Cir. 1992) ("It is a familiar tenet of government contracts that the government cannot be bound by the unauthorized acts of its agents"); ***United States v. D'Apice***, 664 F.2d 75, 78 (5th Cir. 1981) ("It is well established that the federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority"); ***Dresser Indus., Inc. v. United States***, 596 F.2d 1231, 1236 (5th Cir. 1979); ***Hicks v. Harris***, 606 F.2d 65, 68-69 (5th Cir. 1979); ***Robinson v. Vollert***, 602 F.2d 87, 94 (5th Cir. 1979); ***United States v. State of Florida***, 482 F.2d 205, 210 (5th Cir. 1973); ***Posey v. United States***, 449 F.2d 228, 234 (5th Cir. 1971).

Thus, to have succeeded at trial, Ferguson would have had to prove that Bieker and Croteau acted with authority; but, as noted, on summary judgment, he presented no evidenced on this point. Additionally, at least two other federal court decisions have recognized that the Credit Review Committee is the only FDIC entity that can approve settlements. ***FDIC v. Royal Park No. 14, Ltd.***, 2 F.3d 637, 641 (5th Cir. 1993) (affirming grant of summary judgment and noting district court's observation that Credit Review Committee is only entity with authority to approve settlements); ***FDIC v. Spain***, 796 F. Supp. 241, 243 (W. D. Tex. 1992) (finding that only Credit Review Committee had authority to settle). Further, summary judgment evidence presented by the FDIC shows that the Credit Review Committee was solely responsible for the approval of settlements and that it did *not* approve a global settlement.

Ferguson also contends that, even if Bieker and Croteau lacked *actual* authority to enter into a global settlement, they had *apparent* authority to do so, citing ***Valley Ranch Dev. Co. v. FDIC***, 960 F.2d 550, 554 (5th Cir. 1992), for the proposition that *apparent* authority exists if a reasonable person, using diligence and discretion, would have believed that Bieker and Croteau had the authority to enter into a global settlement. In support of his apparent authority claim, Ferguson points to the actions of Bieker and Croteau in negotiating settlements, Croteau's signing the lien releases when the cover letter required the signature of an authorized representative, and the FDIC's failure to communicate to Ferguson the FDIC's internal restrictions on the authority of Bieker and Croteau.

As discussed, those dealing with agents of the Government risk that they have accurately determined that the agent is acting within the bounds of his authority, ***Merrill***, 332 U.S. at 384. Even assuming that the basis for Ferguson's apparent authority contention is correct as a matter of law, the contention still fails; he did not present any evidence upon which we can conclude that a *reasonable* person, exercising diligence and discretion, would have believed that Bieker and Croteau had the authority to enter into a global settlement.

III.

Because Ferguson conceded at oral argument that the authority issue is dispositive, and because we conclude that Bieker and Croteau did not have the requisite settlement authority, the judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

[Filed February 12, 1996]

Civil Action No. 3:91-CV-2494-D

SEARCY M. FERGUSON, JR., *Plaintiff- Counterdefendant,*	)
v.	)
FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Liquidator of the Union Bank & Trust, *Defendant- Counterplaintiff.*	)

MEMORANDUM OPINION AND ORDER

Defendant-counterplaintiff Federal Deposit Insurance Corporation, in its corporate capacity as Liquidator of the Union Bank & Trust ("FDIC"), moves for summary judgment on all the claims of plaintiff-counterdefendant Searcy M. Ferguson, Jr. ("Ferguson"). Ferguson moves for summary judgment on the FDIC's claims, and asks the court to reconsider its November 12, 1993 memorandum opinion and order. The FDIC also moves the court to allow it to initially

present evidence at trial, and for leave to designate expert witnesses. For the reasons that follow, the court grants in part and denies in part the FDIC's motion for summary judgment, denies Ferguson's motion for summary judgment and motion for reconsideration, denies the FDIC's motion to initially present evidence, and grants the FDIC's motion for leave to designate expert witnesses.

I

Although the court has set out the relevant background facts in prior opinions, it will begin with a somewhat extended recitation of the facts and claims in order to assist in the understanding of the rulings entered today.

A

Ferguson is a former shareholder and director of Union Bank and Trust ("Union Bank") who executed nine promissory notes in favor of Union Bank. He executed six notes ("Six Notes") in his individual capacity: (1) a $200,000 note (the "First Note") secured by real property located in Wilbarger County, Texas (the "Wilbarger Property"), Suffolk County, New York (the "Suffolk Property"), and $200,000 in certificates of deposit; (2) a $300,000 note (the "Second Note") secured by the Wilbarger Property, the Suffolk Property, and real property located in Kaufman County, Texas (the "Kaufman Property");[1] (3) a $45,000 note (the

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[1] Ferguson lists the Kaufman Property as collateral for Notes 2-6 and 8-9, but the FDIC does not show this property as collateral. The discrepancy does not appear to impact the instant

"Third Note") secured by a portion of the Kaufman Property; (4) a $100,000 note (the "Fourth Note") secured by the Wilbarger Property, the Suffolk Property, and the Kaufman Property; (5) a $100,000 note (the "Fifth Note") secured by the Wilbarger Property, the Suffolk Property, and the Kaufman Property; and (6) a $100,000 note (the "Sixth Note") secured by the Wilbarger Property, the Suffolk Property, and the Kaufman Property.

Ferguson executed two notes as trustee (the "Trust Notes") on behalf of his children: (1) a $75,000 unsecured note executed on behalf of the Sawnie Elizabeth Ferguson Trust; and (2) a $65,000 note secured by the Kaufman Property and certain stock, and executed on behalf of the Searcy Monroe Ferguson, III Trust ("SMF Trust").

Ferguson executed one note (the "Ninth Note") in both his individual capacity and as trustee of the SMF Trust. The Ninth Note was in the original principal sum of $1,365,000, and was secured by the Kaufman Property.

The FDIC was appointed receiver of Union Bank. It maintains that Union Bank's records showed Ferguson to be delinquent in payment on the notes. Prior to commencement of the FDIC's receivership, Union Bank redeemed the $200,000 in certificates of deposit, and applied the money to satisfy a portion of the outstanding balance on the First Note. The FDIC, acting in its corporate capacity as liquidator, entered into settlement negotiations with Ferguson to resolve

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motions because it is undisputed that Union Bank held the Kaufman Property as collateral.

the remaining indebtedness. Ronald F. Bieker ("Bieker'), a liquidation assistant for the FDIC, communicated with Ferguson and his counsel during the negotiations.

B

The FDIC contends the facts are as follows. Ferguson initially made a settlement offer that would have resolved all outstanding claims, but the FDIC rejected the offer. Ferguson subsequently offered to pay off the Ninth Note if the FDIC would release its liens on the Kaufman Property, and allow Ferguson to sell the land. Ferguson also made arrangements to pay off the Trust Notes with the sale proceeds. Bieker received the offer on behalf of the FDIC, and the FDIC accepted the offer. Ferguson paid the FDIC with three checks equal to the outstanding balances of the Ninth Note and the two Trust Notes.

Ferguson made-- and the FDIC rejected--a subsequent offer to settle the Six Notes. When Ferguson failed to make payments on the Six Notes, the FDIC provided Ferguson with notice of its intent to foreclose on the Wilbarger Property, and thereafter foreclosed on the property, purchasing it for $97,000. The fair market value at the time of foreclosure was $104,000. Although the notice of foreclosure incorrectly included 160 acres of land that had been released to Ferguson, the FDIC corrected the error by excluding this land from the foreclosure sale. The FDIC applied the proceeds to satisfy the First Note, and applied the remainder in partial satisfaction of the Second Note. As of May 25, 1995, the FDIC calculated Ferguson's remaining indebtedness to be $1,099,406.68.

Ferguson maintains the facts are as follows. The Ninth

Note represents an unfunded line of credit, and he never received any money from that note. Ferguson paid $100,000 to Union Bank, and received as consideration the release of the bank's lien on approximately one-fourth of the Wilbarger Property. The FDIC's claim does not reflect this payment.

At the time Ferguson pledged the Suffolk Property as collateral for some of the notes, he owned an undivided 50% interest in the property. Ferguson divorced his wife, Elizabeth Ferguson ("Elizabeth"), and, pursuant to the divorce decree, Elizabeth received the Suffolk Property subject to all liens, claims, and encumbrances. Elizabeth also became a majority shareholder in Union Bank, and married a director of Union Bank. Union Bank's Board of Directors voted to release the liens on the Suffolk property to Elizabeth upon demand. Elizabeth apparently made the appropriate demand, and Union Bank released the liens on the Suffolk Property. Union Bank issued documents releasing the liens (the "Suffolk Releases") as to each of the promissory notes secured by the Suffolk Property. The Suffolk Releases state that they were given "in consideration of the payment in full according to the face and tenor thereof, of [the First Note, the Second Note, the Fourth Note, the Fifth Note, and the Sixth Note]." See P. Mot. Exs. 18-22.

When Ferguson entered into settlement negotiations with the FDIC, he received correspondence that he contends shows the parties contemplated the resolution of all claims. Ferguson maintains that FDIC representative Bieker orally represented to him that all debts could be settled for a lump sum payment. Ferguson paid the money in reliance on this alleged representation. Ferguson directed an escrow company to pay the money on the condition that the FDIC execute

seven releases (the "Settlement Releases") enclosed with the payment. Each Settlement Release contains a recital that acknowledges payment of notes roughly matching the description of the Six Notes. The releases were executed and returned to the escrow company by FDIC employee Anna Croteau ("Croteau"), whose job description included the execution of releases in connection with authorized settlement agreements.

C

Ferguson sues the FDIC for (1) a judgment declaring that the FDIC received full payment through an accord and satisfaction or a novation, or that the FDIC is precluded from recovering on the notes due to estoppel, ratification, waiver, novation, release, and failure of consideration; (2) wrongful foreclosure on the Wilbarger Property or failure to purchase the property at a commercially reasonable price; (3) negligent failure to preserve collateral, based or a below-market sale of the Wilbarger Property, and the release of the Suffolk Property to Elizabeth; (4) breach of fiduciary duty by selling the collateral for less than its market value; (5) breach of contract by failing to honor the Suffolk Releases and the Settlement Releases; (6) fraud, promissory fraud, and negligent misrepresentation based on the FDIC's alleged misrepresentations during the settlement process; and (7) unjustified impairment of collateral based on release of the lien on the Suffolk Property. Ferguson's causes of action divide into claims based on the Suffolk Releases and the Settlement Releases; the FDIC's foreclosure on the Wilbarger Property; Union Bank's release of the Suffolk Property; and the FDIC's conduct during settlement negotiations.

The FDIC counterclaims for payment of amounts

allegedly owed and unpaid on the notes.

Each side has moved for summary judgment.[2] The FDIC seeks summary judgment on the basis that: (1) the uncontested evidence shows the FDIC is entitled to payment; (2) the federal holder in due course doctrine immunizes it from personal defenses based on Union Bank's conduct; (3) Ferguson's fraud claim is invalid because there was no misrepresentation, and because Ferguson cannot reasonably rely on an oral representation by a government employee; and (4) there is no material issue of fact on the remaining issues.

Ferguson also moves for summary judgment, contending that: (1) the notes have been paid in full because the FDIC should have inferred that Ferguson was paying off the Six Notes instead of the Ninth Note; (2) alternatively, the

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[2] Both sides have advanced various challenges to the summary judgment evidence. With the exception of Ferguson's motion to strike the supplemental affidavit of Kevin Ericson ("Ericson"), either the court's holdings do not depend on the disputed evidence, the court has dealt with the issue in a separate part of this opinion, or the court resolves the issues on which the evidence has relevancy in favor of the objecting party. Accordingly, the court denies the parties' objections as moot.

Ferguson objects to the Ericson supplemental affidavit on the basis that the FDIC filed it without obtaining leave of court. Because the supplemental affidavit responds to an issue raised in Ferguson's response to the FDIC's motion for summary judgment, the court declines to strike the affidavit. Ferguson's other objections lack merit. Accordingly, the court denies his motion to strike the Ericson affidavit.

funds in excess of those produced from the sale of collateral should have been applied to the notes on a pro rata basis, and the amount in excess of that produced by the sale should have been applied according to Ferguson's instructions; (3) acceptance of Ferguson's payment resulted in an accord and satisfaction; and (4) the court should reconsider its prior holding that parol evidence is not admissible to vary the Settlement Releases and Suffolk Releases.

II

A

The FDIC contends in its motion for summary judgment that it may recover on the Six Notes by showing that it owns and holds the Six Notes, that Ferguson executed and delivered the notes, and that the amounts due remain outstanding. The FDIC relies on affidavit evidence that Union Bank's records show that Ferguson owes the indebtedness for which the FDIC sues.

Ferguson counters with affidavit evidence that he did not receive any money for the Ninth Note, which he contends represents an unfunded line of credit. He appears to rely on the fact that another bank declined to purchase the Ninth Note as evidence that it was unfunded. Ferguson also maintains that he paid Union Bank $100,000 to be applied to the notes, but that the FDIC's claims do not reflect this payment. Ferguson's evidence shows that he received a partial release of the Wilbarger Property, and he submits that he obtained this partial release in exchange for the $100,000 payment.

The FDIC replies that when a party has submitted a

detailed statement of the amounts owed on an account, the other party cannot refute this evidence with a vague assertion of payment. See GATX Aircraft Corp v. M/V Courtney Leigh, 768 F.2d 711,714-15 (5th Cir. 1985) (upholding grant of summary judgment when account holder submitted detailed 5-page affidavit of amount owed and defendant responded with vague assertion of failure to credit two payments); Golden Oil Co. v. Exxon Co., 543 F.2d 548, 551 (5th Cir. 1976); Olympic Ins. Co. v. H.D. Harrison, Inc., 418 F.2d 669, 670 (5th Cir. 1969). The FDIC submits evidence that Ferguson had overdrafts in his checking account, and that Ferguson instructed Union Bank to apply the disputed $100,000 to cover those overdrafts.

B

The court holds that Ferguson has not raised a genuine issue of material fact as to whether he received credit for the $100,000 payment. Ferguson has presented affidavit evidence that he paid $100,000 for a partial release of the liens on the Wilbarger Property, but the FDIC has responded with specific documentary evidence to the contrary. This imposes on Ferguson the burden of coming forward with evidence other than a vague assertion of failure to credit the $100,000 payment. See GATX Aircraft, 768 F.2d at 714-15. Ferguson has not presented any specific evidence of his instructions on how the $100,000 should have been paid. The court therefore grants the FDIC's motion for summary judgment as to Ferguson's contention that the FDIC did not properly credit the $100,000 payment.

The court holds that Ferguson has raised a material issue of fact as to whether he received proceeds from the

Ninth Note. Ferguson has submitted affidavit evidence that he did not receive any money in exchange for execution of this note. The cases the FDIC cites deal with debtors who asserted full or partial payment of the amounts allegedly due, and the courts held that the debtor must produce some specific evidence of payment. Ferguson asserts that he never received any money. One who alleges payment on an account may be expected to maintain records showing payment, but it is unclear how Ferguson could reasonably be expected to prove a negative--that is, to demonstrate that he never received the money--other than by his own affidavit to that effect. In the absence of any authority holding that an affidavit asserting non-receipt of funds is insufficient, the court holds that Ferguson's affidavit is competent to present a genuine issue of fact, and denies the FDIC's motion for summary judgment on this issue.

III

A

The FDIC moves for summary judgment on Ferguson's defenses of accord and satisfaction, novation, waiver, estoppel, and ratification, contending that only the FDIC Credit Committee has authority to negotiate a settlement or to release the notes. Because Ferguson's defenses depend on actions by Bieker and Croteau, and because the FDIC has submitted evidence that Bieker and Croteau lacked actual or apparent authority, the FDIC contends that Ferguson has not raised a genuine issue of material fact on these defenses. Without distinguishing between the FDIC and employees acting outside the scope of their authority, Ferguson maintains that the FDIC's conduct

forms the basis of these defenses.

Ferguson will have the burden of proof at trial with respect to defenses to enforcement of the Six Notes. When a party who will not have the burden of proof at trial moves for summary judgment, it may meet its summary judgment obligation by pointing the court to the absence of evidence to support the nonmovant's claims. See Celotex Corp v. Catrett, 477 U.S. 317, 325 (1986). If the FDIC meets this burden, the nonmovant must then go beyond his pleadings and designate specific facts showing a genuine issue for trial. See id.; Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam).

Some courts have concluded that only the FDIC Credit Committee has authority to renegotiate or settle a loan. See FDIC v. Royal Park No. 14, Ltd., 2 F.3d 637, 641 (5th Cir. 1993) (noting district court's holding that FDIC liquidation assistant could not renegotiate or settle loans because Texas courts have held that Credit Committee only body with settlement authority); FDIC v. Spain, 796 F. Supp. 241, 243 (W.D. Tex. 1992) (making factual finding that FDIC liquidation assistants have no authority to renegotiate or settle because only Credit. Committee has that authority). The FDIC's evidence establishes that Bicker and Croteau lacked actual or apparent authority to negotiate a settlement or release a note. The FDIC's proof also demonstrates that the Credit Committee did not approve a full settlement or the Settlement Releases. Ferguson has not submitted evidence on the authority issue, and the proof he has adduced is based on conduct by Bicker and Croteau. Without evidence that Bieker and Croteau acted with authority, Ferguson cannot bind the FDIC to their conduct. See Spain, 796 F. Supp. at 244

(holding no waiver by FDIC when defense based on conduct by employees without authority to accept settlement offer).

B

Although the court concludes that the authority issue is determinative, the court addresses other deficiencies in Ferguson's defenses. The court views the Settlement Releases as a recital rather than a promise, see Nov. 12, 1993 Op. at 2; thus Ferguson has failed to present evidence of a written promise. Because it is unreasonable to rely on an oral representation by a government official, see Royal Park, 2 F.3d at 641 (holding in promissory estoppel case that it is unreasonable to rely on oral representation by government official), Ferguson's estoppel claim fails. In addition, Ferguson's novation claim is inapplicable to the facts. Therefore, the court grants the FDIC's motion for summary judgment on Ferguson's defenses of accord and satisfaction, novation, waiver, estoppel, and ratification.

IV

Ferguson also asserts the defense of failure of consideration. Ferguson apparently bases this defense on his contention that the FDIC refused to honor a full settlement, agreement. Without evidence of actual or apparent authority by the FDIC, Ferguson cannot establish the existence of a settlement. Accordingly, the court grants the FDIC's motion for summary judgment on Ferguson's defense of failure of consideration.

V

A

The FDIC moves for summary judgment on Ferguson's fraud claim, asserting that Ferguson cannot produce evidence of a misrepresentation. Alternatively, the FDIC contends that Ferguson's evidence consists of oral misrepresentations, which are insufficient for a fraud claim against the government. The FDIC also contends he cannot establish the reasonable reliance element of a fraud claim. The FDIC also attempts to rely on subsequent offers of settlement by Ferguson as undercutting his assertion that the parties entered into a full settlement. Ferguson relies on correspondence between the parties, as well as the Settlement Releases, as evidence of written misrepresentations. By contrasting the Settlement Releases and the FDIC's position in this litigation, Ferguson posits that he has produced evidence that the FDIC made a promise with no present intent to perform. He also challenges the admissibility of the FDIC's evidence concerning settlement negotiations.

B

Because Ferguson has the burden of proof on his fraud claim, the FDIC has met its summary judgment obligation by pointing the court to the absence of evidence to support the claim. See Celotex, 477 U.S. at 325. Ferguson must therefore designate specific facts showing a genuine issue for trial. Id.; Little, 37 F.3d at 1075.

Whether Ferguson asserts fraud or promissory fraud, he must establish reasonable reliance. The court agrees with the FDIC's position that Ferguson cannot establish reliance unless he submits evidence oral representation or promise by an FDIC official with authority. In Rosas v. United States

Small Business Admin., 964 F.2d 351 (5th Cir. 1992), a guarantor of a loan attempted to argue that Small Business Administration ("SBA") officials had made certain fraudulent representations, but the Fifth Circuit rejected this argument. "The possible misrepresentations by SBA representatives are of no help to guarantors in their defense of fraud or mutual mistake. Even assuming such misrepresentations were made, the United States is not bound by actions of its agents exceeding their scope of authority." Id. at 360 (quoting United States v. R & D One Stop Records, Inc., 661 F.2d 433,434 (5th Cir. 1981). Therefore, because Ferguson has failed to submit evidence that Bieker and Croteau acted with authority, the court holds that Ferguson also fails to raise a material issue of fact on his fraud claim.

VI

The court next addresses the FDIC's motion for summary judgment on Ferguson's claims of wrongful foreclosure, failure to preserve collateral, commercial reasonableness, and breach of fiduciary duty.

A

The FDIC moves for summary judgment on Ferguson's commercial reasonableness claim, contending that commercial reasonableness applies only to personal property. Ferguson maintains that the duty of commercial reasonableness applies to the sale of the Wilbarger Property.

Alternatively, he posits that the Wilbarger Property is personal rather than real property. The court agrees with the FDIC.

"In Texas, a chattel mortgagee must conduct a commercially reasonable foreclosure sale in order to recover a deficiency based on the bid amount. However, foreclosure of real property under a deed of trust need not be at a 'commercially reasonable' sale, and the failure to conduct a commercially reasonable foreclosure sale of real property is not actionable." Pentad Joint Venture v. First Nat'l Bank, 797 S.W.2d 92, 97 (Tex. App. 1990, writ denied) (citations omitted); see also Huddleston v. Texas Commerce Bank-Dallas, N.A., 756 S.W.2d 343,347 (Tex. App. 1988, writ denied) (holding that commercial reasonableness does not apply to real property).

Ferguson does not describe the personal property that served as collateral, but he apparently refers to the inclusion of certain fixtures and improvements as part of the security agreement. The presence of these items does not convert the Wilbarger Property into personal property. Accordingly, the court grants the FDIC's motion for summary judgment on Ferguson's commercial reasonableness claim.

B

The court next addresses the FDIC's motion for summary judgment on Ferguson's wrongful foreclosure claim.

Ferguson alleges that the FDIC's foreclosure on the Wilbarger Property was wrongful because he had already paid off the disputed notes. Ferguson also contends that the notice of foreclosure included approximately 160 acres of the Wilbarger Property that had already been released. Ferguson also asserts that the FDIC failed to bid fair market value on the Wilbarger Property pursuant to the Texas Property Code.

The FDIC moves for summary judgment on the basis that Ferguson's late payment on the Six Notes justified foreclosure on the Wilbarger Property. Although the FDIC concedes that the notice of foreclosure incorrectly described the property, it maintains that Ferguson cannot establish damages because the FDIC corrected the mistake prior to foreclosure. Finally, the FDIC submits evidence that it bid fair market value for the Wilbarger Property, and it contends that Ferguson has not submitted probative evidence to the contrary.

1

Because the court holds today that there are material issues of fact as to the amount due on the notes, it also holds that there is a material issue of fact concerning whether the FDIC wrongfully foreclosed on the Wilbarger Property. Ferguson maintains that the Ninth Note represents an unfunded line of credit. If this assertion is correct, the FDIC may not have had the fight to foreclose on the Wilbarger Property.

2

The court next considers whether the alleged procedural irregularities in the sale of the Wilbarger Property support a wrongful foreclosure claim.

In order to prevail on a wrongful foreclosure claim, Ferguson must show (1) an irregularity in the sale that (2) caused or contributed to cause (3) sale of the property at a grossly inadequate price. American Says. & Loan Ass'n v. Musick, 531 S.W.2d 581,587 (Tex. 1975); but see Charter

Nat'l Bank-Houston v. Stevens, 781 S.W.2d 368, 374 (Tex. App. 1989, writ denied) (holding that price need not be grossly inadequate in action for money damages). The FDIC concedes that the notice of foreclosure mistakenly included 160 acres of land, but it has presented evidence that it did not foreclose on this portion of the property. Thus the FDIC reasons that Ferguson has not presented evidence of causation, i.e, that the alleged irregularities caused a reduced selling price.

In response, Ferguson offers two procedural irregularities: (1) the misdescription of the property; and (2) issues concerning "whether the Substitute Trustees had been properly and timely appointed so that they had authority to act." P. Resp. at 31. Ferguson does not elaborate on the alleged defects in appointment of the substitute trustees, and the court has been unable to locate any summary judgment evidence of such defects. Therefore, the court considers only the irregularity in the description of the property.

The FDIC has presented evidence that it corrected the description of the Wilbarger Property prior to the sale, and that it did not attempt to sell the previously-released property. Not every procedural defect leads to a wrongful foreclosure claim. Ferguson has not submitted any evidence of how this defect caused a reduced sales price. Without evidence of causation, Ferguson cannot establish a wrong foreclosure claim. Accordingly, the court grants the FDIC motion for summary judgment on Ferguson's wrongful foreclosure claim to the extent that the Ferguson attempts to rely on alleged procedural defects in the sale.

The court now addresses whether Ferguson has presented material issues of fact on his claim that the FDIC failed to bid fair market value for the Wilbarger Property.

In its motion to initially present evidence, the FDIC maintains that it has the burden of proof at trial to establish fair market value. Because the FDIC has the burden of proof, it must conclusively establish that it paid fair market value for the Wilbarger Property in order to obtain summary judgment. See, e.g., Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) (stating that summary judgment movant who bears burden of proof must establish essential elements of claim or defense "beyond peradventure"); Bank One Tex., N.A. v. Prudential Ins. Co., 878 F. Supp. 943,962 (N.D. Tex. 1995) (Fitzwater, J.).

The Texas Property Code provides for an offset to liability on a note when the fair market value of property at the time of foreclosure exceeded the actual sales price. Tex. Prop. Code Ann. § 51.003 (West 1995). The FDIC has submitted evidence that the fair market value of the Wilbarger Property at the time of sale was $104,000. The FDIC acquired the property for $97,000. The FDIC has presented evidence that the $7,000 difference between the fair market value and the sales price represents unpaid taxes and holding costs, allowable deductions under Texas law. In response, Ferguson states, "The fair market value of the [Wilbarger Property] upon which the FDIC foreclosed was at least $500 per acre or $160,000 at the time the FDIC foreclosed. I sold a nearby farm for $600 per acre." Ferguson Aff. at ¶ 17.

Under Texas law and Fifth Circuit precedent, the owner of land may testify as to the market value of the owned

property without qualifying as an expert witness. LaCombe v. A-T-O, Inc., 679 F.2d 431,433 (5th Cir. 1982) (citing general principle that ownership alone qualifies owner to testify as to value of property); Porras v. Craig, 675 S.W.2d 503,504 (Tex. 1984). "Such testimony is admitted because of the presumption of special knowledge that arises out of ownership of the land." LaCombe, 679 F.2d at 434 (quoting United States v. 329.73 Acres of Land, 666 F.2d 281,284 (5th Cir. 1982), modified on other grounds, 704 F.2d 800 (5th Cir. 1983) (en banc)). Thus an owner's testimony as to market value has been admitted even when the owner failed to provide the basis for his testimony. Star Houston, Inc. v. Kundak, 843 S.W.2d 294 (Tex. App. 1992, no writ). Based on these precedents, the court overrules the FDIC's objection that Ferguson has failed to provide relevant evidence of market value. Therefore, the court holds that Ferguson's testimony raises a material issue of fact as to the value of the Wilbarger Property.

C

Ferguson contends the FDIC breached a fiduciary duty by failing to maximize the value of the Wilbarger Property. The FDIC maintains that under Texas law there is no fiduciary duty between a lender and a borrower. Ferguson does not appear to have responded to this contention.

It is well-established under Texas law that the relationship between a borrower and a lender is not a fiduciary relationship. Lovell v. Western Nat'l Life Ins., 754 S.W.2d 298, 303 (Tex. App. 1988, writ denied); Consolidated Bearing & Supply Co. v. First Nat'l Bank, 720 S.W.2d 647, 650 (Tex. App. 1986, no writ) (longstanding

relationship between debtor and bank did not establish a relationship of trust and confidence). Accordingly, the court grants the FDIC's motion for summary judgment on this claim.

VII

The FDIC moves for summary judgment as to Ferguson's contention that the statute of limitations bars the FDIC from recovering on the notes.

Ferguson bases his statute of limitations argument on the Suffolk Releases and the Settlement Releases. Ferguson posits that the releases represent terms of a contract, and thus cannot be contradicted without pleading reformation. Ferguson theorizes that, because the FDIC has not pleaded reformation within the applicable period, the FDIC's action is barred.

The FDIC argues that, due to this court's prior holding, Ferguson's argument must fail. The court agrees. The court has previously held that the Suffolk Releases and the Settlement Releases are recitals of consideration rather than terms of the contract. Parol evidence is admissible without the need for pleading rescission because the FDIC is not attempting to alter the terms of the contract. Therefore, the court grants the FDIC's motion for summary judgment on Ferguson's defense that the statute of limitations bars the FDIC's recovery on the notes.

VIII

The court now turns to the FDIC's motion for

summary judgment on Ferguson's prayer to, punitive damages. The FDIC contends that punitive damages cannot be assessed against it. Ferguson asserts, without further explanation, that the FDIC is liable for such damages because it acted to obtain funds for its own benefit. The court agrees with the FDIC.

Absent congressional authorization, punitive damages may not be awarded against the FDIC as receiver for a failed bank. Bank One, Tex., N.A. v. Taylor, 970 F.2d 16, 33 (5th Cir. 1992), cert., denied, ____U.S.____, 113 S.Ct. 2331 (1993). This rule stems from the well-established principle that an agency or instrumentality of the United States is immune from punitive damage awards. Royal Bank of Canada v. FDIC, 733 F. Supp. 1091, 1099 (N.D. Tex. 1990) (Fitzwater, J.).

The FDIC in its corporate capacity is an "agency" of the United States. FDIC v. Bank One, Waukesha, 881 F.2d 390, 392 (7th Cir. 1989); FDIC v. Petersen, 770 F.2d 141, 143 (10th Cir. 1985). Therefore, the FDIC in its corporate capacity is likewise not subject to a punitive damage award. See FDIC v. Tito Castro Constr., Inc., 548 F. Supp. 1224, 1226 (D. P.R. 1982) ("as a matter of federal law the FDIC in its corporate capacity is not subject to a state usury claim"), aff'd, 741 F.2d 475 (lst Cir. 1984).

Because no congressional authorization exists for assessment of punitive damages against the FDIC, Ferguson's claim for punitive damages both against the FDIC as receiver and in its corporate capacity is dismissed.

IX

The FDIC argues that Ferguson is not entitled to the remedy of rescission, contending that, because all amounts are due and owing on the Six Notes, Ferguson must offer to pay off the notes before seeking rescission. Ferguson submits that he has paid off the Six Notes based on the Settlement Releases and his allegation that the Ninth Note represents an unfunded line of credit. Ferguson reasons that he is entitled to rescission because the FDIC had no authority to foreclose on property securing fully paid notes.

The court holds that Ferguson has raised a material issue of fact on his rescission claim. Ferguson contends that the Ninth Note represents an unfunded line of credit. Under this view, much of Ferguson's settlement payment should have been applied to the Six Notes. This raises a material issue of fact as to whether the FDIC had authority to foreclose on the Wilbarger Property. Accordingly, the court denies the FDIC's motion for summary judgment on Ferguson's rescission claim.

X

The FDIC also moves for summary judgment on Ferguson's conversion claim. It contends that conversion applies only to personal property, and thus does not apply to foreclosure on the Wilbarger Property. The FDIC recognizes that the certificates of deposit that acted as collateral are personalty, but contends there is no evidence of conversion. Ferguson's brief does not respond to this issue. The court agrees with the FDIC.

"Conversion is a cause of action related to the wrongful possession of chattels and does not apply to realty." Rodriguez v. Dipp, 546 S.W.2d 655, 658 (Tex. Civ. App. 1977, writ ref'd n.r.e.). The Wilbarger Property is not the proper subject oral conversion action. Ferguson has not presented any other evidence of conversion. Therefore, the court grants the FDIC's motion for summary judgment on Ferguson's conversion action.

XI

The court now considers the FDIC's assertion that it must prevail on Ferguson's claim that the FDIC failed to pay the settlement checks in accordance with Ferguson's instructions.

Ferguson maintains that he provided the FDIC with specific instructions regarding which notes he wanted to pay, but that the FDIC applied these payments to the Ninth Note in contravention of his directives. Ferguson maintains that his payment should have been credited to the Six Notes. Alternatively, he asserts that the FDIC should have applied the proceeds of the Kaufman Property on a pro rata basis to all notes secured by that property.

The FDIC acknowledges that a debtor may provide a creditor with payment instructions, but avers that it received no instructions in this case. The FDIC also acknowledges that, absent consent, the proceeds from a sale of collateral apply to the debts secured by the collateral. It maintains, however, that Ferguson consented to the FDIC's application of the proceeds.

When a debtor has more than one obligation, he generally has the right to designate the obligation to which payment should apply. First Nat'l Bank v. United States, 591 F.2d 1143, 1147 (5th Cir. 1979). The court must determine whether Ferguson has presented evidence of payment instructions.

It is undisputed that Ferguson sent the three settlement checks to the FDIC through an escrow agent, who mailed the checks to the FDIC on Ferguson's behalf. In addition to the checks, the escrow agent mailed a letter and the Settlement Releases. The letter states, in pertinent part, that a check is enclosed "in the amount of $1,583,327.04... representing loan payoffdue on [a note that fits the description of the Ninth Note], along with seven (7) Releases of Lien which must be executed by an authorized representative of the FDIC and acknowledged before a Notary Public." P. Resp. Ex. B. The Settlement Releases appear to describe the Six Notes, although there are discrepancies concerning the dates of the notes, and the capacity in which Ferguson acted when he executed the notes.

Ferguson reasons that his instructions can be inferred from the circumstances of the letter. Ferguson contends that the letter, by referring to releases of the Six Notes, instructed the FDIC to pay off those notes first. Ferguson has also presented evidence that the Ninth Note represented an unfunded line of credit. The court holds that the letter, combined with Ferguson's contention that the Ninth Note was unfunded, raises a material issue of fact regarding whether Ferguson instructed the FDIC to pay off the Six Notes. Therefore, the court denies the FDIC's motion for summary judgment on this issue.

XII

The FDIC contends the federal holder in due course doctrine entitles it to partial summary judgment precluding Ferguson from raising the defenses of accord and satisfaction, waiver, release, estoppel, and ratification to the extent such defenses are predicated on conduct undertaken by Union Bank. The FDIC also maintains that the federal holder in due course doctrine extends to collateral like the Kaufman Property, and that the doctrine precludes Ferguson's affirmative claims of failure to exercise ordinary care to preserve collateral, conversion, and failure to act in a commercially reasonable manner to the extent Ferguson bases the claims on Union Bank's conduct.

Ferguson argues the doctrine is inapplicable because the FDIC does not qualify as a holder in due course under the normal state law requirements. He asserts that because bank records contain evidence of Union Bank's conduct, the FDIC had actual or constructive knowledge of Union Bank's behavior, and thus cannot qualify as a holder in due course. The FDIC asserts that it does not have to satisfy the normal state law requirements for a holder in due course. Campbell Leasing, Inc. v. FDIC, 901 F.2d 1244, 1249 (5th Cir. 1990) (stating that FDIC enjoys holder in due course status "whether or not [it] satisfies] the technical requirements of state law"); Sunbelt Savs., FSB v. Amrecorp Realty Corp., 742 F. Supp. 370, 371 (N.D. Tex. 1990) (Fitzwater, J.) (on reconsideration) (interpreting Campbell Leasing as abrogating three traditional requirements for holder in due course status).

The parties have not addressed whether the law in the Fifth Circuit has been overruled by the Supreme Court's

limited view of federal common law in O'Melveny & Myers v. FDIC, ___U.S.___,114 S.Ct. 2048 (1994). The O'Melveny & Myers case may impact the issues before the court. See DiVall Insured Income Fund L.P.v. Boatmen s First Nat l Bank of Kansas City, 69 F.3d 1398, 1399 (5th Cir. 1995)(holding that state law applies to determine holder in due course doctrine absent specific statutory provision). In the absence of briefing on O'Melveny & Myers, the court declines to grant summary judgment in the FDIC s favor on the basis of the federal holder in due course doctrine.[3]

XIII

The court now turns to Ferguson's motion for summary judgment.

A

Ferguson contends that he is entitled to summary judgment because he has paid the Six Notes in full. Because he asserts that the Ninth Note represents an unfunded line of credit, he reasons his settlement payment should have been applied to the Six Notes instead of to the Ninth Note. He also asserts that the letter from his escrow agent directed the FDIC to apply his payment to the Six Notes.

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[3] But cf. RTC v. Sands, 863 F. Supp. 365, 369 (N.D. Tex. 1994) (Fitzwater, J.) (holding that O'Melveny & Myers did not overrule Fifth Circuit precedent that precludes officers and directors from maintaining certain affirmative defenses against the RTC).

The FDIC has presented competent summary judgment evidence that the amounts are due and owing. It has introduced evidence that the Ninth Note was not an unfunded line of credit. When viewing the escrow letter in the light most favorable to the FDIC as the nonmovant, the court concludes that the letter does not provide instructions to apply the payment to the Six Notes. The FDIC's evidence raises genuine issues of material fact. As a result, the court, denies Ferguson's motion for summary judgment based on the assertion that he has made full payment.

B

Alternatively, Ferguson contends that the proceeds from the sale of the Kaufman Property should have been applied to the notes it secured on a pro rata basis, and the amount in excess of that produced by the sale should have been applied according to Ferguson's instructions.

Ferguson relies on Miller v. White, 264 S.W. 176 (Tex. Civ. App. 1924, no writ), for his argument that the FDIC was obligated to apply the proceeds of the Kaufman Property on a pro rata basis. Miller provides that "[w]here payments are involuntary, the creditor has no fight of appropriation, but must apply the money toward the discharge of all the debts in proportion." Id. at 179 (emphasis added). The creditor in Miller foreclosed on a farm, id., at 177; hence, the payment was involuntary. In this case, the FDIC released its liens on the Kaufman Property to Ferguson as part of voluntary negotiations. Miller is therefore inapposite.

Accordingly, the court denies Ferguson's motion for summary judgment on the basis that he is entitled to pro rata

allocation of the Kaufman Property proceeds.

C

Ferguson moves for summary judgment on the basis of accord and satisfaction. The court denies this portion of Ferguson's motion as moot because the court has granted the FDIC's motion for summary judgment on this issue.

D

Ferguson moves the court to reconsider its prior holding that parol evidence is admissible in connection with the Suffolk Releases and the Settlement Releases. The court denies Ferguson's motion for reconsideration.

XIV

Based on Sweet Jan Joint Venture v. FDIC, 809 F. Supp. 1253 (N.D. Tex. 1992) (Fitzwater, J.), the FDIC argues it is the true plaintiff in this case because Ferguson's claims act as defenses or offsets to his liability on the notes. It therefore moves to initially present evidence. Ferguson opposes the motion on the basis that he has the burden of proof on his affirmative claims.

The court denies the FDIC's motion to initially present evidence. Unlike Sweet Jan, where the court had dismissed all of the plaintiffs' claims, id. at 1259, today's opinion does not dispose of all of Ferguson's claims. The court declines to rearrange the order of the presentation of evidence so long as Ferguson retains affirmative claims on which he bears the burden of proof at trial. The court denies as moot Ferguson's

motion to strike the FDIC reply brief in connection with this motion.

XV

The FDIC moves for leave to designate expert witnesses on the issue of attorney's fees. Ferguson has not established undue prejudice in the event the request is granted. Attorney's fee experts are substantively distinguishable from other types of witnesses. Indeed, the less formal procedure for proving attorney's fees is consonant with permitting the FDIC to substitute the new expert witnesses under the circumstances presented here. See Fed. R. Civ. P. 54(d) (as amended effective December 1, 1993) (providing that unless the substantive law governing the action provides for the recovery of attorney's fees as an element of damages to be proved at trial, attorney's fee claims decided on motion made after entry of judgment).

* * *

The court grants in part and denies in part the FDIC's motion for summary judgment, denies Ferguson's motion for summary judgment and motion for reconsideration, denies the FDIC's motion to initially present evidence, and grants the FDIC's motion for leave to designate expert witnesses.

SO ORDERED.

February 12, 1996

/s/_____
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

[Filed November 12, 1993]

Civil Action No. 3:91-CV-2494-D

SEARCY M. FERGUSON, JR., *Plaintiff- Counterdefendant,*	)
v.	)
FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Liquidator of the Union Bank & Trust, *Defendant- Counterplaintiff.*	)

MEMORANDUM OPINION AND ORDER

I

This is an action by plaintiff-counterdefendant Searcy M. Ferguson, Jr. ("Ferguson") against defendant-counterplaintiff Federal Deposit Insurance Corporation ("FDIC") in its corporate capacity a liquidator of the Union Bank and Trust ("Union Bank"). Ferguson sues for wrongful foreclosure, negligence, breach of fiduciary duty, breach of

contract, fraud, negligent misrepresentation, unjustified impairment of collateral, and conversion. The FDIC has counterclaimed to recover the unpaid balances and interest due on several promissory notes executed in favor of Union Bank and First National Bank of Garland.

The trial of this action commenced on November 8, 1993. At that time plaintiff Ferguson requested, without objection from the FDIC, that the court decide a narrow evidentiary question. Ferguson urged that the court's disposition of the issue could promote settlement of the case or at least focus the presentation of evidence so as to expedite the balance of the trial.

The court is asked to decide whether, as a matter of law, the FDIC can introduce extrinsic evidence to vary the terms of certain written releases in order to prove that full payment was not received in exchange for release of the liens. The parties have stipulated to the introduction of the evidence that the court requires to make this determination. The court has heard oral argument and considered supplemented briefs.

The dispositive question is whether the relevant parts of the releases in question contain recitals or acknowledgments of consideration as opposed to a contractual consideration. The court holds the portions at issue are recitals or acknowledgments. Therefore, Texas law permits the FDIC to introduce parol evidence to contradict the relevant recitals contained in the releases in question.

II

The FDIC foreclosed in 1992 on the 320-acre Glazner Farm in Wilbarger County, Texas mortgaged as security for Ferguson's indebtedness. Ferguson's wrongful foreclosure action, and his defenses to the FDIC's counterclaim, are based in part on his contention that there was no valid debt upon which the FDIC could recover or foreclose. Ferguson supports this contention by tendering various releases, some of which were signed by B. Randell Brint, President of union Bank, and others of which were signed by Ana Croteau, Commercial Department Head for the FDIC. These documents purport to acknowledge payment of the notes and to release the liens on other real estate in Kaufman County, Texas and Suffolk County, New York, pledged as security for the same notes. The FDIC does not dispute the language used in the releases, and does not seek to defeat the releases of lien, but desires to introduce extrinsic evidence to rebut the statements in the releases that acknowledge payment of the notes.

In the absence of fraud, accident, or mistake, the parol evidence rule prohibits the introduction in evidence of oral evidence for the purpose of varying, adding to, or contradicting the terms of a valid written instrument that on its face is complete and unambiguous. Time Ins.Agency, Inc. v. Grimes, 613 S.W.2d 40, 42 (Tex. Civ. App. 1981, no writ). An exception to the rule is that parol evidence is admissible to show want or failure of consideration and to establish the real consideration given for the instrument. Boy Scouts v. Responsive Terminal Sys., Inc., 790 S.W.2d 738, 744 (Tex. App. 1990, writ denied). A recital or acknowledgment of consideration received is no more than a

statement of fact that may be contradicted by parol evidence. Id. It is not permissible, however, to accept extrinsic evidence to contradict a contractual consideration. Id. A contractual consideration is "[a] written promise to perform in the future, whether by money or in services" as opposed to "a receipt or by way of acknowledgment of something performed in the past." Id. (quoting Chalk v. Daggett, 257 S.W. 228, 230 (Tex. Comm'n App. 1924, judgm't adopted)).

In Evans v. Evans, 766 S.W.2d 356, 357 (Tex. App. 1989, no writ), the question presented on appeal was whether certain indebtedness secured by a lien had been released by a document that released the lien. The evidence showed that the borrower on a real estate note had not paid the full amount of the note. After citing the exception to the parol evidence rule noted above, the court held that the recitation in the release of 'full and final payment" was rebutted by undisputed evidence that the note was not paid in full. The court ordered the judgment reformed to provide the plaintiff recovery of the unpaid balance of the underlying debt.[1]

Ferguson cites Kunkel v. Kunkel, 515 S.W.2d 941, 946 (Tex. Civ. App. 1974, writ ref'd n.r.e.), for the proposition that a recitation in a deed is contractual in nature and cannot be impeached by parol evidence. The court disagrees. The recitation in the releases of lien at issue in the

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[1] In Evans the plaintiff originally sued to set aside the release of lien. Id. at 356. The jury found against the plaintiff, who did not appeal this aspect of the judgment. Id. The court of appeals held that the lien itself was released. See id. at 357 ("The lien against the property has been released.")

present case are not contractual in nature. The FDIC, unlike the facts in Kunkel, is not trying to defeat the releases. Ferguson's reliance on Williams v. Glash, 789 S.W.2d 261 (Tex. 1990), is also misplaced. There the plaintiff was attempting to avoid the effect of a release in a personal injury case in order to bring suit for injuries unknown at the time of signing. Neither do Rapid Transit Co. v. Smith, 86 S.W. 322 (Tex. 1905), and Lindsay v. Clayman, 254 S.W.2d 777 (Tex. 1952), require a different result. In both cases the recitations were contractual in nature. Under the principles stated above, they could not be contradicted by parol evidence. Moreover, in Rapid Transit the plaintiff was seeking to avoid the release by contending it was obtained by fraud. In the instant case, the FDIC is simply seeking to explain the recitation of payment in the releases of lien.

On five of the notes in question (dated October 23, 1985, November 21, 1986, December 24, 1986, January 30, 1987, and February 17, 1987), Ferguson has tendered releases of lien on property in Suffolk County, New York executed by Union Bank. These state, for example, '[t]hat in consideration of the payment in full according to the face and tenor thereof, of certain promissory note in the original principal amount of $100,000.00 dated February 17, 1987. . . the owner and holder of said note, do hereby release the Deed of Trust lien.' Also on five of the notes (dated November 21, 1986, December 2, 1986, December 24, 1986, January 30, 1987, and February 17, 1987), Ferguson has submitted releases of lien executed by the FDIC on Kaufman County property that state: 'Holder of the note acknowledges its payment and releases the property from the lien.' The language of the Union Bank releases is strikingly similar to that of the Evans release, wherein the court allowed parol

evidence to contradict the recital of full payment. Additionally, the consideration mentioned in the Union Bank and the FDIC releases is in the form of a receipt or acknowledgment of consideration performed in the past and is not contractual consideration. Therefore, the court holds that these recitals can be contradicted by parol evidence.[2]

SO ORDERED.

November 12, 1993.

/s/_____
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

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[2] Although the parties have argued the issue in their submissions, the court has not been formally asked to decide at this juncture whether the pretrial order (which now governs instead of the complaint, answer, counterclaim, and reply to counterclaim) supports an assertion by the FDIC of ambiguity, accident, mistake, lack of failure of consideration, or any other theory by which the FDIC would seek to vary the terms of the releases. The court intimates no view regarding this question. If the case is not settled following entry of this ruling, the court will decide the issue by appropriate motion before reconvening the trial.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed: November 8, 1993]

Civil Action No. 3:91-CV-2494-D

SEARCY M. FERGUSON, JR., *Plaintiff*,	)
v.	)
FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for the Union Bank and Trust, and THE UNITED STATES OF AMERICA, *Defendants*.	)

PRETRIAL ORDER

COMES NOW, Plaintiff Searcy M. Ferguson and Defendants Federal Deposit Insurance Corporation, in its capacity as Receiver for the Union Bank and Trust, and the United States of America, and pursuant to Local Rule 7.1 file this Pretrial Order:

SUMMARY OF CLAIMS AND DEFENSES

A. PLAINTIFF SEARCY M. FERGUSON*

1. Background and Accounting -

Plaintiff instituted this action after the Federal Deposit Insurance corporation ("FDIC") announced its intention to foreclose on the 320 acre Glazner Farm in Wilbarger County, Texas, which the FDIC alleged secured indebtedness of Plaintiff.** Plaintiff borrowed money from Union Bank and Trust prior to his divorce on January 6, 1987. There was a note for $1,365,000, the bank's legal loan limit. This was a blanket note originally dated November 5, 1986. There was never a check issued for $1,365,000. This was a line of credit note. There were note payments, participation notes and renewals. Because of the bank's loan limit, all notes over $1,365,000 were secured by certificates of deposit, which totaled exactly $600,000. Union Bank, without discussion, later offset $200,000 from the certificates of deposit on the subject notes. Plaintiff believes duplicate notes were executed because of confusion about the bank's lending limit and believes clerical errors were made by bank employees. Plaintiff's loans were secured by $600,000 in certificates of deposit, a lien on a 320-acre tract farm in Wilbarger County; liens on Kaufman County farms of Plaintiff; and a lien on a

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* Plaintiff's claims are based upon the allegations in Plaintiff's Third Amended Complaint which was filed along with a Motion for Leave on 3/17/93.

** The U.S.A. is added as a party defendant pursuant to 28 U.S.C. Sec. 2671 et seq.

Suffolk County home. The Wilbarger County farm was appraised in 1986 for $160,000. The Kaufman County farm along with contiguous property belonging to Ferguson's father was sold for $6,200,000, and $3,000,000 was escrowed to settle all debts with the FDIC. The property in Suffolk County had a fair market value of at least $1,800,000 in 1987.

2. Suffolk County (Southhampton, New York) Loans -

Plaintiff and his ex-wife, Elizabeth Ferguson Smith, were divorced on January 6, 1987. This indebtedness to Union Bank was primarily attributed to oil drilling and farm operations, Mrs. Smith's large diamond, and the Suffolk County construction loans. Mrs. Smith received the Suffolk County property as part of the January 6, 1987 divorce settlement. Pursuant to the terms of the January 6, 1987, divorce settlement agreement, each party unequivocally assumed all indebtedness or liens on property they received. At the time of the Suffolk mortgage loans in 1986, a deed of trust was prepared and delivered to Union Bank and Trust on only Mr. Ferguson's 50% community interest as security behind $800,000 in loans. Plaintiff had paid $500,000 for the Southhampton lot, and about $1,200,000 in construction costs out of bank borrowings. The loan instruments were mailed to the Suffolk County courthouse for recordation by the bank, but apparently were not recorded because recording fees had not been paid by the bank. Plaintiff understood and believed the liens were recorded. These liens were assumed by Mrs. Smith as part of the divorce settlement. In December 1987, the new bank president of Union Bank and Trust, who had just received a $75,000 bonus from the Board of Directors, of which Mrs. Smith's new husband was a member, arbitrarily,

fraudulently and wrongfully released the Suffolk deed of trust to Mrs. Smith without obtaining Plaintiff's waiver, approval, knowledge or consent, and fraudulently schemed such conduct even though the Board had full knowledge that the collateral being released secured Plaintiff's subject notes herein, being a total of $800,000. Mrs. Smith, at the Board's advice, made a demand to have the liens released even though Mrs. Smith was required to pay the notes secured by the liens pursuant to her divorce agreement, which the bank had a copy; and thereby extinguished the Suffolk collateral to Plaintiff's damage.

3. Crouch Foreclosure -

Previously, on or about April 7, 1987, Union Bank and Trust released its lien on a 160-acre tract of land (Crouch farm) under two notes, one for $300,000 and one for $200,000. Notwithstanding the release of this collateral, Defendant FDIC also sought to foreclose on this property in this lawsuit. This was clearly an attempt at wrongful foreclosure.

4. Fraudulent Misrepresentation or Promises -

After Defendant FDIC was appointed receiver of Union Bank and Trust, Plaintiff initiated negotiations with Defendant to pay off all indebtedness held by the FDIC. Defendant promised Plaintiff Ferguson and Ferguson's attorney a good discount if a large sum was offered. the FDIC officer said it had to be at least $1,200,000. Plaintiff believed Defendant to be truthful. Plaintiff later escrowed $3,000,000 to settle the FDIC issue. An agreement was reached and Plaintiff fully performed by paying the agreed

$1,750,000 to Defendant. In return, Plaintiff understood that Defendant agreed to release all collateral pledged to secure his indebtedness to Union Bank and Trust and all amounts owing. Defendant executed releases of liens including, without limitation, a release of the lien on property in Kaufman County, Texas securing a note which Defendant later asserted was in default and sought to foreclose on the released property. Defendant, however, breached the agreement by failing and refusing to execute releases on all property pledged as security. On or about January 7, 1992, Defendant FDIC did foreclose on certain property, the 320-acre Glazner Farm.

5. Accord and Satisfaction, etc. -

One such release prepared by the FDIC at the time of the payment was for "No disclosed amount". The money was accepted and cashed by the FDIC. Based upon this fact, Plaintiff seeks a declaratory judgment providing that the alleged indebtedness has been paid or satisfied through an accord and satisfaction or novation and that Defendant FDIC is precluded from recovering on the notes by the doctrines of accord and satisfaction, novation, estoppel, ratification, waiver, release, and failure of consideration and that all liens securing the indebtedness have been fully released as a result of Plaintiff's payment.

6. Damages -

a. Plaintiff also seeks to recover his damages caused by Defendant FDIC's breach of its agreement pursuant to which Plaintiff paid $1,750,000 and believed he would receive releases of all collateral. Plaintiff also asserts that

Defendant FDIC has wrongfully committed fraud and gross negligent misrepresentations because it had no intention of honoring the agreement and promises made and failed to disclose that there was other indebtedness which it would seek to recover after being paid as agreed with the intend of inducing Plaintiff to rely and pay Defendant the agreed $1,750,000.

b. Plaintiff asserts that Defendant's foreclosure was wrongful because (a) Defendant was not entitled to foreclose; (b) its notices were defective; (c) its notices contained improper descriptions, and (d) the sale was not conducted in a commercially reasonable manner. Plaintiff seeks to rescind the sales and recover title and possession of his property or, should rescission be denied, Plaintiff seeks to recover the fair market value of the property, the crop rents squandered in the amount of over $10,000, and Plaintiff seeks to recover exemplary damages.

c. Plaintiff asserts that Union Bank and Defendant FDIC have been negligent in fulfilling their duty to exercise ordinary care to secure and preserve his property securing the indebtedness and seeks to be discharged from any liability in whole or to the extent of the reasonable value of the loss. Plaintiff also asserts that Union Bank and Defendant FDIC's failure to protect and preserve the collateral constitutes an unjustified impairment of collateral and breach of the duty to act in a commercially reasonable manner and seeks to recover his damages as a result thereof, including, without limitation, all mounts paid to Defendant FDIC up to $800,000 plus interest, and seeks to recover the property foreclosed upon or, in the alternative, the fair market value thereof.

d. Plaintiff asserts that Defendant FDIC breached its fiduciary duty to maximize the amount received from the Wilbarger County and Suffolk County collateral and seeks recovery of the damages caused thereby.

e. Plaintiff asserts that Union Bank and Trust and Defendant FDIC converted his property by taking possession of the collateral securing the indebtedness and disposing of it without receiving the value of said Wilbarger County property without Plaintiff's knowledge or consent. Plaintiff therefore seeks to recover the value of said property.

f. With regard to the property on which Defendant FDIC did foreclose, Plaintiff has requested, pursuant to Tex. Prop. Code §51.003, a determination of the fair market value of the property and all relief authorized thereby.

7. Other Defenses -

In response to Defendant FDIC's Counterclaim seeking to recover on certain notes as receiver of Union Bank and Trust, Ferguson denies that any amounts are owed on said notes and asserts that Defendant FDIC is precluded from recovering on the notes, in whole or in part, by the statute of limitations and laches, the doctrines of accord and satisfaction, release, waiver, estoppel, and ratification, the parol evidence rule and as more specifically set forth in Plaintiff's Complaint.*

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* Based upon the assertions in Plaintiff's First Amended Answer to Counter-claim which was filed with Plaintiff's Motion

B. DEFENDANT FDIC

In general, FDIC's contentions are as follows:

Plaintiff is a former Chairman of the Board and major stockholder of the failed Union Bank and Trust. In the fall of 1986 and continuing into early 1987, Plaintiff borrowed at least $845,000.00 from Union Bank and Trust in six transactions. These loans were secured, in part, by deeds of trust on three groups of property located in Kaufman County, Texas, Wilbarger County, Texas, and Suffolk County, New York. The interest pledged in the Suffolk County property was a "undivided 50% interest" according to information provided to Union Bank and Trust.

At the time that most of the loans secured by the Suffolk County property were made, Plaintiff was involved in a divorce from Elizabeth R. Ferguson. Unknown to Union Bank and Trust when several of the loans were made, Plaintiff was under court order in his divorce proceeding not to pledge any property, including that located in New York. The property was again used as collateral after divorce was granted. In late 1987, Union Bank and Trust was informed for the first time that Plaintiff had not been authorized to pledge the New York property. Mrs. Ferguson had received the property in the divorce settlement and she demanded through her counsel that the deeds of trust on that property be returned. The deeds of trust had not been filed and they, along with releases of liens, were provided by the bank.

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for Leave on March 17, 1993.

On or about April 7, 1987, Union Bank and Trust released its lien on a 160 acre tract of land in Wilbarger County, Texas. At one time, FDIC did seek to foreclose on this property. The error was called to FDIC's attention, then the property was released from the foreclosure.

FDIC entered into settlement negotiations with Plaintiff in 1988. Plaintiff originally sought to settle all of his obligations to the FDIC by paying a sum less than $2,000,000.00. The FDIC rejected this proposal. Plaintiff and the FDIC ultimately reached an agreement to settle FDIC's claims on three notes: one made by Plaintiff in the original amount of $1,365,000.00, one made by Sawnee Ferguson in the original amount of $67,795.38, and one made by Searcy Ferguson, III Trust in the original amount of $63,506.67. All of these loans had outstanding interest. As part of this transaction FDIC released all of its liens on the Kaufman County, Texas property to enable Mr. Ferguson to sell it. FDIC expressly reserved its remaining collateral, chiefly real estate in Wilbarger County, Texas and invited Mr. Ferguson to make a proposal to settle his remaining debt. FDIC complied fully with the terms and conditions of the settlement agreement between itself and Plaintiff. On or about January 7, 1992, FDIC foreclosed on its remaining collateral, 320 acres located in Wilbarger County, Texas.

In view of the continued failure of Plaintiff to make payments on the Ferguson Notes, FDIC decided to foreclose on the Wilbarger County property (the "Property"). The FDIC appointed Substitute Trustees under the Deeds of Trust. The FDIC filed written notice of the time, date, place, and terms of the proposed Substitute Trustee's Sale in accordance with the terms of the Deeds of Trust and applicable law.

Copies of the Notice of Sale were mailed to the Plaintiff on that same day in accordance with the terms of the Deeds of Trust and applicable law. A Notice of the Sale was also filed in the Deed Records of Wilbarger County and was posted at the courthouse of Wilbarger County at least twenty-one (21) days prior to the proposed sale date.

Prior to conducting the foreclosure sale, the FDIC had the Property appraised. These appraisals, in part, formed the basis for the FDIC's subsequent bid-price at the foreclosure sale. The bid-price calculated by the FDIC was subject to adjustments to reflect holdings costs and related charges such as taxes, insurance, maintenance, brokerage commissions, and attorney's fees.

On January 7, 1992, the Substitute Trustee sold the Property at the door of the Wilbarger County Courthouse to the highest bidder, FDIC for cash.

In accordance with the terms of the Deeds of Trust, a Substitute Trustee's Deed was executed and delivered to the FDIC as Purchaser. The Substitute Trustee's Deed was recorded in the Deeds Records of Wilbarger County, Texas.

FDIC contends that Plaintiff is not entitled to the declaratory judgment sought in that no accord and satisfaction or novation ever occurred on the debt which FDIC now seeks to recover from Plaintiff. The doctrines of estoppel, ratification, waiver, release, and failure of consideration have no application and FDIC did not release its liens on the foreclosed Wilbarger County property as a result of the 1988 settlement.

Plaintiff has incurred no damages as a result of the settlement in that FDIC fully complied with the settlement. There was no fraud or negligent misrepresentation by the FDIC and Plaintiff was fully aware of all of his indebtedness to the FDIC.

FDIC was fully entitled to foreclose as it did and its foreclosure was properly conducted in all respects.

Union Bank and Defendant FDIC have discharged all lawful obligations with respect to securing and preserving the property securing the indebtedness. Union Bank and Defendant FDIC did not fail to protect and preserve appropriate collateral and there was no impairment of collateral or failure to act in a commercially reasonable manner.

Defendant FDIC owed no fiduciary duty to Plaintiff and therefore breached no such duty.

Neither Union Bank and Trust nor the FDIC converted the property of Plaintiff. All of the acts of either Union Bank and Trust or Defendant FDIC were done lawfully and in accordance with law.

Plaintiff is entitled to no relief under Tex. Prop. Code § 51.003.

In so far as Plaintiff is attempting to maintain an action in tort under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. ("FTCA") Plaintiff has failed to comply with the jurisdictional prerequisite of the FTCA.

Plaintiff's alleged claims against the FDIC are barred by the provisions of FIRREA, 12 U.S.C. § 1811 et seq., 12 U.S.C. § 1823(e), 12 U.S.C. § 1821(j), 12 U.S.C. § 1821(d)(3)(B), 12 U.S.C. § 1821(d)(13)(D), and applicable federal common law, including D'Oench Duhme and its progeny, and the Federal Holder in Due Course Doctrine.

Although it denies it is liable to Plaintiff for any damages of any nature, FDIC specifically denies that it is liable to Plaintiff for any alleged interest, penalties, punitive damages, or attorney's fees and affirmatively asserts applicable law which prohibits the recovery of such damages from FDIC.

FDIC's defenses to the claims asserted by Plaintiffs include federal preemption of the state law on which Plaintiffs base their assertions. FDIC asserts that Section 51.003 of the Texas Property Code is preempted and that Plaintiffs' claims are barred by the D'Oench Duhme Doctrine, 12 U.S.C. § 1823(e), and the Federal Holder in Due Course Doctrine.

FDIC specifically denies that all conditions precedent to Plaintiff's right to recover

C. DEFENDANT UNITED STATES OF AMERICA

The United States has filed a Motion to Dismiss under Fed. R. Civ. P. 12(b) (1) on the ground that this Court lacks subject matter jurisdiction over the claims raised under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 et seq. In addition to the factual defenses outlined by

FDIC above, the legal defense relied upon by the United States are raised in its Motion. It should be noted that since the Motion was brought under Rule 12(b)(1), the defenses raised therein by the United States do not depend on factual development during discovery or trial, but are decided on the basis of the facts as alleged by Plaintiff in his Second Amended Complaint.

The United States has raised several grounds in its Motion as grounds for dismissal for lack of subject matter jurisdiction. It is well settled, for example, that the FTCA is a limited waiver of the United States' sovereign immunity and that the scope of that waiver does not extend to claims arising out of the breach of a contractual duty or obligation. Davis v. United States, 961 F.2d 53, 56 (5th Cir. 1991); City National Bank v. United States, 907 F.2d 536, 546 (5th Cir. 1990). Since all of Plaintiff's causes of action against the United States arise out of the breach of one or more contractual agreements between Plaintiff and FDIC, this Court lacks jurisdiction over them.

For example, many of Plaintiff's claims are based on his contention that FDIC agreed to accept $2,000,000 in exchange for the release of Plaintiff's obligations under all of the notes held by FDIC to which he was an obligor. As such, Plaintiff contends that FDIC could not seek to enforce the notes at issue in this action and its foreclosure on the properties which secured these notes were without legal effect.

Thus, under Plaintiff's theory of the case, the enforcement of the notes and the foreclosure of the collateral constitute a breach of the agreement Plaintiff reached with

FDIC. Any claims based on this breach, however, cannot be brought against the United States under the FTCA.

This analysis also applies to Plaintiff's claims for fraud and negligent misrepresentations which, he contends, are based on the contention that FDIC promised him that his payment of $2,000,000 would extinguish his obligation under the notes at issue in this action. These claims simply seek the enforcement of the contractual agreement as Plaintiff understood it because of the alleged misstatements made by FDIC before the contract was entered into. Since these claims arise out of the contractual agreement between Plaintiff and FDIC, they cannot be brought against the United States under the FTCA.

The remaining claims raised by Plaintiff are based on his contention that FDIC wrongfully foreclosed on the property securing the notes by failing to dispose of the collateral in a commercially reasonable manner. These claims also sound in contract because they are based on the alleged failure of FDIC to fulfil its obligations, as defined by the notes, in regard to the sale of the collateral. As such, they cannot be brought under the United States under the FTCA. See e.g. Davis, 961 F.2d at 55 (no subject matter jurisdiction under the FTCA for claim based on allegation that the sale price obtained for collateral was far below market value).

In the alternative, if this court finds that the claims raised against the United States sound in tort, Plaintiff has failed to comply with the prerequisites for bringing suit under the FTCA by failing to file an administrative claim under the FTCA. Under the provisions of 28 U.S.C. §2675(a), a party bringing suit under the FTCA is required to present a valid

administrative claim to the appropriate federal agency. Although Plaintiff contends that he has met these requirements, a search of the records of the FDIC has revealed that it has not received an administrative claim arising out of the facts raised in the Second Amended Complaint. Because this requirement is jurisdictional in nature, the claims against the United States must be dismissed if this Court finds that Plaintiff did not file an administrative claim. Gregory v. Mitchell, 634 F.2d 191, 203-04 (5th Cir. 1981).

Finally, even if this Court finds that Plaintiff's claims sound in tort and that Plaintiff complied with the administrative claim requirement, they are specifically barred under the FTCA. 28 U.S.C. § 2680(h) states that the sovereign immunity of the United States extended to "{a}any claim arising out of . . . misrepresentation, deceit, or interference with contract rights . . ." See also City of Garland v. Zurn Industries, Inc., 870 F.2d 320, 323 (5th Cir. 1989); Baroni v. United States, 662 F.2d 287, 289 (5th Cir. 1981). In addition, the United States is not liable to the extent that any of the claims arise out of the actions of Union Bank prior to its insolvency because subject matter jurisdiction under the FTCA is strictly limited to the acts or omissions of employees of the federal government. 28 U.S.C. 1346(b). It should also be noted that Plaintiff has failed to perfect service of the Second Amended Complaint upon the United States in the manner required under Fed. R. Civ. P. 4(d)(4).

STIPULATED FACTS

1. Plaintiff is an individual who resides in Dallas County, Texas.

2. Defendant FDIC purports to be the owner and holder of two notes in the original principal amounts of $200,000 and $300,000 dated October 23, 1986 and November 21, 1986 respectively.

3. The two notes set forth above were secured by a lien on certain real property in South Hampton, New York with a market value of at least $1,800,000.

4. On or about October 23, 1986, Plaintiff executed a note payable to Union Bank and Trust in the original principal amount of $200,000 which note was secured by first liens on certain property in Wilbarger County, Texas, and Suffolk County, New York. In addition, this note was secured by two certificates of deposit in the principal amount of $100,000 each. These certificates of deposit were offset against the $200,000 note.

5. On or about November 21, 1986, Plaintiff executed a note payable to Union Bank and Trust in the original amount of $300,000 which was secured by second liens on property in Wilbarger County, Texas; Kaufman County, Texas; and Suffolk County, New York.

6. In addition to the above referenced two notes, Plaintiff had other indebtedness to Union Bank and Trust.

7. After Defendant FDIC was appointed receiver of Union Bank and Trust, Plaintiff entered into negotiations with Defendant in an effort to resolve all issues as to all of his outstanding obligations to Union Bank and Trust.

8. An agreement was reached between Plaintiff and Defendant FDIC pursuant to which Plaintiff paid $1,750,000 to Defendant FDIC.

9. After Defendant had paid as set forth above, Defendant took the position that Plaintiff's indebtedness to Union Bank, including the $200,000 and $300,000 notes, had not been paid.

10. On or about October 9, 1991, Defendant FDIC notified Plaintiff of its intent to foreclose on Plaintiff's property in Wilbarger County, Texas, and posted said property for foreclosure on November 5, 1991.

11. By letter of December 11, 1991, Defendant FDIC again notified Plaintiff that it claimed the indebtedness had not been paid and that it intended to foreclose on the Wilbarger County property. Defendant intended to proceed to foreclose based upon the alleged defaults under the $200,000 and $300,000 notes which have been paid. A portion of the land in Wilbarger County, Texas (Crouch farm) was erroneously listed on the original foreclosure documents filed by the FDIC.

12. On January 7, 1993, Defendant FDIC conducted a foreclosure sale on the Wilbarger County, Texas property.

CONTESTED ISSUES OF FACT

1. Whether Union Bank and Trust wrongfully or erroneously released the deed of trust lien on the property in Suffolk County, New York, securing $800,000 of Plaintiff's notes.

2. Whether Union Bank and Trust released the deed of trust lien on the Suffolk County, New York property to Mrs. Smith without Plaintiff's knowledge or consent.

3. Whether there was an agreement or accord and satisfaction between Plaintiff and Defendant FDIC pursuant to which Plaintiff paid $1,750,000 to Defendant in satisfaction of all indebtedness to Union Bank and Trust and was to receive a release of all liens on collateral pledged to secure the indebtedness.

4. Whether Union Bank and Trust or Defendant FDIC were negligent in performing their duty to exercise ordinary care to secure and preserve the collateral for the indebtedness from waste, injury or loss.

5. Whether Defendant FDIC breached this agreement.

6. The fair market value of the property upon which Defendant FDIC foreclosed.

7. Whether Defendant FDIC had liens on the property upon which it foreclosed.

8. Whether the FDIC's Notice of Trustee Sale, or the giving or posting thereof, were defective and such defect caused or contributed to the property being sold for an inadequate amount.

9. Whether the foreclosure sale was conducted in a commercially reasonable manner.

10. Whether the FDIC purchased the property at the foreclosure sale.

11. Whether the property was sold at the foreclosure sale for a grossly inadequate price.

12. Whether Defendant FDIC breached its fiduciary duty to Plaintiff in failing to maximize the amount received in disposing of the collateral.

13. Whether Defendant FDIC made any representations of past or present fact, or failed to disclose any facts, which were material, false, and which were made to Plaintiff with the intent that Plaintiff would rely thereon and Plaintiff did rely thereon to his detriment.

14. Whether Defendant FDIC made representations in the course of its business, or in a transaction in which it had a pecuniary interest, which are false, were made for the guidance of Plaintiff in his business, and Defendant did not exercise reasonable care or competence in obtaining or communicating the information, and Plaintiff suffered pecuniary loss by justifiably relying on the representation.

15. Whether Union Bank and Trust and Defendant FDIC wrongfully exercised dominion and control over Plaintiff's property in denial of or inconsistent with Plaintiff's rights.

16. Whether Defendant FDIC knowingly relinquished the right to seek to recover any amounts from Plaintiff above and beyond the amounts paid by Plaintiff.

17. Whether Defendant FDIC knowingly relinquished the right to seek to foreclose on the collateral securing the indebtedness.

18. The amount of actual damages that Plaintiff is entitled to recover.

19. The amount of exemplary damages that Plaintiff is entitled to recover.

20. The amount of attorneys' fees that Plaintiff is entitled to recover.

21. Whether the Plaintiff filed a valid administrative claim with FDIC.

22. Whether Plaintiff executed three notes in the original amounts of $100,00.00 dated in December 1986, January 1987 and February 1987, respectively.

23. Whether Plaintiff received the proceeds of three notes in the original amounts of $100,000.00 dated in December 1986, January 1987 and February 1987, respectively.

24. What is the amount of the outstanding balance, with interest, of the notes executed by Plaintiff at the failed Union Bank and Trust for value and not paid to FDIC.

25. The amount of attorney's fees that FDIC is entitled to recover.

26. The amount of actual damages that FDIC is entitled to recover.

27. The amount of interest that FDIC is entitled to recover.

CONTESTED ISSUES OF LAW

1. Whether Union Bank and Trust's release of the deed of trust lien on the Suffolk County, New York property to Mrs. Smith discharges Plaintiff from the alleged indebtedness, in whole or in part and extinguishes said alleged indebtedness.

2. Whether the payment made by Plaintiff to Defendant FDIC constitutes an accord and satisfaction or novation of Plaintiff's indebtedness to Union Bank and Trust.

3. Whether the FDIC is precluded from recovering, in whole or in part, on the notes by the doctrines of estoppel, ratification, waiver, release, or failure of consideration.

4. Whether the foreclosure conducted by Defendants FDIC was wrongful.

5. Whether the claims brought against the United States arise out of the breach of contractual agreement between the Plaintiff and the FDIC.

6. Whether this Court has subject matter jurisdiction under the FTCA over claims sounding in contract brought against the United States.

7. Whether the Plaintiff complied with the administrative claim requirement for bringing suit under the FTCA.

8. Whether this Court has jurisdiction over claims brought against the United States under the FTCA for claims arising out of fraud or misrepresentation.

9. Whether this Court has jurisdiction over claims brought against the United States arising out of the acts of Union Bank and Trust.

10. Whether any representation allegedly relied upon by Plaintiff by any representative of the FDIC is binding upon the FDIC.

11. Whether FDIC owed any duty to Plaintiff, and particularly a fiduciary duty.

12. Whether foreclosure sales of real property under Texas law must be conducted in a commercially reasonable manner.

13. Whether Plaintiff can recover attorney's fees from FDIC or the United States.

14. Whether Plaintiff can recover exemplary damages against FDIC or the United States.

15. Whether Plaintiff can recover interest from FDIc or the United States.

16. Whether Plaintiff's claims against the FDIC are barred by the provisions of FIRREA, 12 U.S.C. § 1811 et seq., 12 U.S.C. § 1823(e), 12 U.S.C. § 1821(j), 12 U.S.C. § 1821(d)(3)(b), 12 U.S.C. § 1821(d)(13)(D), 12 U.S.C. § 1823(d)(3)(a) and applicable federal common law, including D'oench Duhme and its progeny, and the Federal Holder in Due Course Doctrine.

17. Whether Plaintiff's claims based upon § 51.003 of the Texas Property Code are preempted by federal law.

18. Whether Plaintiff is entitled to a credit on the deficiency owing based upon any alleged deficiency in statutory notice in the amount of the reasonable fair market value of the property.

ESTIMATED LENGTH OF TRIAL

1. Plaintiff estimates that the trial will take three days.

ADDITIONAL MATTERS

1. Plaintiff and Defendant FDIC have requested that this matter be referred to mediation.

2. There are two pending motions before the Court. First, Plaintiff's motion for Leave to File his Third Amended Complaint and Amended Answer to Counterclaim which was filed on March 17, 1993. Second, Defendant United States of America's Motion to Dismiss filed on or about April 9, 1993.

3. Under the provisions of 28 U.S.C. § 2402, any claims tried against the United States must be decided by the Court without a jury.

SIGNED THIS 8th day of November, 1993.

/s/_____
UNITED STATES DISTRICT JUDGE

STUART E. SCHIFFER
Acting Assistant Attorney General

RICHARD H. STEPHENS
United States Attorney

MYRNA B. SILEN
Assistant United States Attorney

PAUL F. FIGLEY
Deputy Director, Torts Branch
Civil Division

/s/_____

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Attorneys for Defendant
UNITED STATES OF AMERICA

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed: November 9, 1992]

Civil Action No. 3:91-CV-2494-D

SEARCY M. FERGUSON, JR.,
Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for the Union Bank and Trust,
Defendant.

ORDER

The October 5, 1992 motion for leave to file amended pleading filed by Federal Deposit Insurance Corporation in its capacity as Receiver for the Union Bank and Trust ("Union Bank") is granted to the extent that it may amend to add affirmative defenses and a counterclaim with respect to Union Bank transactions and is denied to the extent the Federal Deposit Insurance Corporation in its corporate capacity as Liquidator of First National Bank of Garland seeks to enter this suit.

SO ORDERED.

November 9, 1992.

s/_____
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: March 8, 1999]

No. 97-10315

Appeal from the United States District Court
for the Northern District of Texas, Dallas

SEARCY M. FERGUSON, JR.,
Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, Etc., Et Al.,
Defendants,

FEDERAL DEPOSIT INSURANCE CORPORATION, in its Corporate capacity as Liquidator of the Union Bank & Trust,
Defendant-Appellee.

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/_____
Rhesa Hawkins Barksdale
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed: April 29, 1993]

CIVIL ACTION NUMBER
CA3-91-2494-D

SEARCY M. FERGUSON, JR.	)
Plaintiff and Counter/Defendant,	)
	)
v.	)
	)
FEDERAL DEPOSIT INSURANCE	)
CORPORATION, IN ITS CAPACITY	)
AS RECEIVER OF THE	)
UNION BANK AND TRUST,	)
Defendant and Counter/Plaintiff.	)
	)

MOTION TO RESTYLE CASE

COMES NOW Defendant and Counter/Plaintiff Federal Deposit Insurance Corporation in its Corporate capacity as Liquidator of Union Bank and Trust ("FDIC") and files this Motion to Restyle Case and in support thereof would show the Court the following:

1. This case was originally filed in the 49th Judicial District Court of Wilharger County, Texas under the style Searcy M. Ferguson, Jr. vs. Federal Deposit Insurance Corporation in its capacity as Receiver for the Union Bank and Trust. The FDIC removed this case to this Court but failed to note the erroneous title of the case, both the real property which forms the basis of Plaintiff's action and notes which form the basis of the FDIC's action as Counter/Plaintiff arise solely in its Corporate capacity as Liquidator of the Union Bank and Trust. The FDIC agreed to join the issues in this litigation directly rather than side stepping Plaintiff's claims by alleging that it had "sued the wrong party." However, the FDIC erroneously failed to seek to change the designation of the case or to otherwise correct the error committed by Plaintiff. This fact does not indicate any feeling on the part of the FDIC that the distinction between the Corporate and Receivership capacities of the Federal Deposit Insurance Corporation are insignificant. Rather, in this instance it is merely reflective of an oversight on the part of FDIC's counsel.

2. The requested change in the style of this case has no substantive impact on any of the issues litigated herein. At no past, present or future time in this litigation, based on the issues as raised in the pleadings on file and sought to be filed, will the distinction between the FDIC and its Corporate and Receivership capacities have any impact on the outcome of this case. Accordingly, the requested change is made merely for the purpose of clarity and accuracy.

WHEREFORE, the Federal Deposit Insurance Corporation in its Corporate Capacity as Liquidator of the Union Bank and Trust requests that the style of this case be

amended to reflect the correct capacity of the FDIC in this litigation rather than the erroneously identified receivership capacity.

Respectfully submitted,

By: /s/_____

J. Richard Tubb
State Bar No. 20260400

FEDERAL DEPOSIT INSURANCE
CORPORATION - LEGAL DIVISION
5080 Spectrum Dr., Suite 400W
Dallas, Texas 75248
(214) 788-7536
FAX No.: (214) 788-7507

ATTORNEYS FOR FEDERAL DEPOSIT INSURANCE CORPORATION IN ITS CORPORATE CAPACITY AS LIQUIDATOR OF UNION BANK AND TRUST

CERTIFICATE OF CONFERENCE

I certify that on the ___ day of April, 1993, I discussed the foregoing Motion with counsel for Plaintiff and Counter/Defendant, Robert M. Greenberg. Mr. Greenberg did not say whether he did or did not oppose the relief sought in this Motion. I was unable to reach Mr. Greenberg by telephone today.

/s/_____
J. Richard Tubb

CERTIFICATE OF SERVICE

I certify that on April ___, 1993, I sent by certified mail, return receipt requested a true and correct copy of the foregoing pleading to the following parties or their counsel:

Robert M. Greenberg
Attorney at Law
1330 Riverbend Park, Suite 850
Dallas, TX 75247

/s/_____
J. Richard Tubb

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed: October 15, 1992]

Civil Action No. 3:91-CV-2494-D

SEARCY M. FERGUSON, JR.,	)
Plaintiff and	)
Counter/Defendant,	)
	)
v.	)
	)
FEDERAL DEPOSIT INSURANCE	)
CORPORATION, IN ITS	)
CAPACITY AS RECEIVER FOR	)
THE UNION BANK AND TRUST,	)
Defendant and	)
Counter/Plaintiff,	)
	)
FEDERAL DEPOSIT INSURANCE	)
CORPORATION, IN ITS	)
CORPORATE CAPACITY AS	)
LIQUIDATOR OF FIRST	)
NATIONAL BANK OF GARLAND,	)
Counter/Plaintiff.	)

FIRST AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM OF DEFENDANT FEDERAL DEPOSIT INSURANCE CORPORATION

COMES NOW Defendant Federal Deposit Insurance Corporation, in its capacity as receiver for the Union Bank and Trust, ("FDIC") and files this Original Answer to Plaintiff's Original Petition and Verified Application for Temporary Restraining Order, ("Plaintiff's Original Petition") and would respectfully show the Court as follows:

ORIGINAL ANSWER

1. FDIC admits the allegations contained in paragraph 1 of the complaint.

2. FDIC admits the allegations contained in paragraph 2 of the Complaint.

3. FDIC admits the allegations contained in paragraph 3 of the Complaint.

4. FDIC denies the allegation contained in paragraph 4 of the Complaint that "the $200,00.00 note was paid off." FDIC admits the remaining allegations contained in paragraph 4 of the Complaint.

5. FDIC admits the allegations contained in paragraph 5 of the Complaint.

6. FDIC denies the allegations contained in paragraph 6 of the Complaint.

7. FDIC admits the allegation contained in paragraph 7 of the Complaint that Plaintiff had other indebtedness to Union Bank and Trust. FDIC does not possess sufficient information to admit or deny the allegations regarding the value of the property or the conveyance to Elizabeth Ferguson Smith. FDIC denies the remaining allegations of paragraph 7 of the Complaint.

8. FDIC admits the allegations contained in paragraph 8 of the Complaint.

9. FDIC admits that a settlement agreement was reached between FDIC and Plaintiff. However, FDIC denies that said settlement agreement extinguished all indebtedness to Union Bank and Trust. FDIC denies the remaining allegations of paragraph 9 of the Complaint.

10. FDIC admits the allegations contained in paragraph 10 of the Complaint.

11. FDIC admits the allegations contained in the first two sentences of paragraph 11 of the Complaint. FDIC admits that a portion of land in Wilbarger County, Texas was erroneously listed on the original foreclosure documents filed by FDIC. Said property was removed from the foreclosure. FDIC's Brief in Response to Plaintiff's Application for Temporary Restraining Order and Temporary Injunction page 10, paragraphs 18 and 19. FDIC denies the remaining allegations of paragraph 11 of the complaint.

12. FDIC admits the allegations contained in paragraph 12 of the Complaint.

13. FDIC denies the allegations of paragraph 13 of the Complaint.

14. The allegations of paragraph 14 of the Complaint contain no factual statements to which a responsive pleading is required.

15. The allegations of paragraph 15 of the Complaint contain no factual statements to which a responsive pleading is required.

16. FDIC denies the allegations of paragraph 16 of the Complaint.

17. The allegations of paragraph 17 of the Complaint contain no factual statements to which a responsive pleading is required.

18. The allegations of paragraph 18 of the Complaint contain no factual statements to which a responsive pleading is required.

19. FDIC denies the allegations of paragraph 19 of the Complaint.

20. FDIC denies the allegations of paragraph 20 of the Complaint.

21. The allegations of paragraph 21 of the Complaint contain no factual statements to which a responsive pleading is required.

22. FDIC denies the allegations of paragraph 22 of the Complaint.

23. The allegations of paragraph 23 of the Complaint contain no factual statements to which a responsive pleading is required.

24. FDIC denies the allegations of paragraph 24 of the Complaint.

25. The allegations of paragraph 25 of the Complaint contain no factual statements to which a responsive pleading is required.

26. FDIC denies the allegations of paragraph 26 of the Complaint.

27. FDIC denies the allegations of paragraph 27 of the Complaint.

28. The allegations of paragraph 28 of the Complaint contain no factual statements to which a responsive pleading is required.

29. FDIC denies the allegations of paragraph 29 of the Complaint.

30. The allegations of paragraph 30 of the Complaint contain no factual statements to which a responsive pleading is required.

31. FDIC denies the allegations of paragraph 31 of the Complaint.

32. As to any other allegations of the Complaint to which a responsive pleading has not been previously provided by the FDIC, the FDIC denies such allegations.

AFFIRMATIVE DEFENSES

33. With respect to each and every cause of action attempted to be alleged within the Complaint, Plaintiff fails to state a claim upon which relief can be granted against the FDIC.

34. Insofar as Plaintiff is attempting to maintain an action in tort under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. ("FTCA"), Plaintiff has failed to name the only proper party to such an action, the United States of America.

35. Insofar as Plaintiff is attempting to maintain an action in tort under the FTCA, Plaintiff has failed to serve the United States of America.

36. Insofar as Plaintiff is attempting to maintain an action in tort under the FTCA, Plaintiff has failed to comply with the jurisdictional prerequisite of the FTCA.

37. Plaintiff's alleged claims against the FDIC are barred by the provisions of FIRREA, 12 U.S.C. § 1811 et seq., 12 U.S.C. § 1823(e), 12 U.S.C. § 1821(j), 12 U.S.C. § 1821(d)(3)(B), 12 U.S.C. § 1821 (d)(13)(D), and applicable Federal Common Law, including D;Oench Duhme and its progeny, and the Federal Holder In Due Course Doctrine.

38. Although it denies it is liable to Plaintiff for any damages of any nature, FDIC specifically denies that it is liable to Plaintiff for any alleged interest, penalties, punitive damages, or attorney's fees and affirmatively asserts applicable law which prohibits the recovery of such damages from FDIC.

39. FDIC specifically denies that all conditions precedent to Plaintiff's right to recover under any of the alleged claims have occurred or been performed since Plaintiff has failed to file or present the alleged claims in accordance with the law as more particularly set forth herein.

ORIGINAL COUNTERCLAIM

The Federal Deposit Insurance Corporation in its capacity as Receiver of Union Bank and Trust ("FDIC"), and the Federal Deposit Insurance Corporation, in its corporate capacity as Liquidator of First National Bank of Garland, ("FDIC-Corporate"), for its causes of action against Plaintiff/Counter-Defendant Searcy M. Ferguson, Jr., state the following:

Nature of the Suit

1. Counter-Plaintiffs FDIC and FDIC-Corporate bring this action seeking recovery upon various promissory notes.

Parties

2. The Federal Deposit Insurance Corporation is a corporation organized and existing under the laws of the

United States of America and appears in this proceeding in its Receivership and Corporate capacities.

3. Counter-Defendant Searcy M. Ferguson, Jr. is an individual who has already appeared in this proceeding by filing suit against FDIC and who may be served with process through his counsel Robert M. Greenberg, 1535 W. Mockingbird Lane, Suite 405, Dallas, Texas 75235.

Jurisdiction and Venue

6. This Court has subject matter jurisdiction over this action pursuant to the provisions of 12 U.S.C. § 1819 and 28 U.S.C. § 1345.

7. Venue is proper in this district and division pursuant to the provisions of 28 U.S.C. § 1391(b).

Bank Closing

8. On or about May 5, 1988, the Banking Commissioner of Texas closed Union Bank and Trust ("Union Bank"), and pursuant to 12 U.S.C. §§ 191 and 1821(c), appointed the FDIC as Receiver. Among the assets of Union Bank placed into FDIC Receivership were certain promissory notes executed by Searcy M. Ferguson, Jr. and all renewals, extensions and modifications thereof ("Ferguson Union Notes"), security agreements and certain deeds of trust as more fully described herein, and all rights, claims and causes of action appurtenant thereto.

9. Plaintiff FDIC is the owner and holder of the Ferguson Union Notes and is transferee and/or beneficiary of

the security agreements and deeds of trust, and all rights, claims, and causes of action appurtenant thereto.

10. On or about March 29, 1990, the Comptroller of the Currency (the "Comptroller"), pursuant to 12 U.S.C. §§ 191 and 1821(c) declared First National Bank of Garland ("First Bank") insolvent. The Federal Deposit Insurance Corporation was appointed by the Comptroller as Receiver. Thereafter, the Federal Deposit Insurance Corporation, as Receiver, conveyed to FDIC-Corporate, certain assets formerly owned by First Bank. Among the assets of First Bank conveyed to FDIC-Corporate, were a certain real estate note and all extensions and renewals thereof (collectively the "Ferguson First Bank Note") and a deed of trust, as more fully described herein, and all rights, claims, and causes of action appurtenant thereto. Accordingly, the FDIC, became the true party in interest herein, authorized and empowered to institute and prosecute this action.

11. FDIC-Corporate is the owner and holder of the Ferguson First Bank Note and is transferee and/or beneficiary of the deed of trust and all rights, claims, and causes of action appurtenant thereto.

The Notes

10. Searcy M. Ferguson, for value received, executed and delivered to Union Bank and First Bank the Ferguson Union Notes and the Ferguson First Bank Note, payable to the Order of Union Bank and First Bank respectively. The Ferguson Union Notes and the Ferguson First Bank Note were all renewed and extended one or more times. The most recent extensions of these notes were

executed for the following principal amounts on the dates shown below:

DATE	Principal Amount
01/30/87	$100,000.00
04/24/87	$200,000.00
05/05/87	$100,000.00
05/21/87	$300,000.00
06/22/87	$100,000.00
04/13/87	$100,000.00

Each of the foregoing notes was subject to interest charges. These interest rates, or a default rate of interest, continue to accrue to this day. True and correct copies of each of the foregoing notes are attached hereto as collective Exhibit A and are incorporated herein by reference. The Ferguson Union Notes and the Ferguson First Bank Note have all matured by their terms. Searcy M. Ferguson, Jr. has failed and refused and continues to fail and refuse to make payment of the unpaid principal and the accrued but unpaid interest due under the Ferguson Union Notes and the Ferguson First Bank Note.

13. FDIC and FDIC-Corporate, or the closed bank named above, have foreclosed on most of the collateral pledged, mortgaged, or otherwise conveyed as security by Searcy M. Ferguson, Jr. for the Ferguson Union Notes or the Ferguson First Bank Note. Certain other collateral has previously been released by FDIC in exchange for payments by Searcy M. Ferguson, Jr. and others. After all just and lawful credits and offsets have been applied, there remain outstanding balances on all of the Ferguson Union Notes and the Ferguson First Bank Note.

Plaintiff's Damages

14. The outstanding balance of unpaid principal and accrued but unpaid interest due under the Ferguson Union Notes and the Ferguson First Bank Note with all credits, payments and offsets applied thereto through the date of the filing of this Counterclaim exceeds $975,000.00.

15. Counter-Plaintiff FDIC and FDIC-Corporate prays for judgment of all amounts due under the Ferguson Union Note and the Ferguson First Bank Note including interest through the date of the judgment and post-judgment interest thereon at the highest rate permitted by law.

Attorney's Fees

20. As a result of the failure of Counter-Defendant Searcy M. Ferguson to pay his indebtedness to the FDIC and to FDIC-Corporate, the FDIC and FDIC-Corporate have been required to retain legal counsel to bring this action. The FDIC and FDIC-Corporate are entitled to recover their reasonable attorneys' fees and costs for trial and appeals pursuant to the terms of the Ferguson Union Notes and the Ferguson First Bank Note and pursuant to § 38.001 et seq. of the Texas Civil Practice and Remedies Code.

Conditions Precedent

21. All conditions precedent to the right of the FDIC and FDIC-Corporate to recover the relief and damages set forth herein have occurred, have been performed, and/or have been waived.

Prayer

FDIC requests that the Court grant the relief requested herein, the dismissal of FDIC as a party; or judgment that the Plaintiff take nothing from FDIC; the release of the lis pendens filed by Searcy M. Ferguson, Jr.; and that FDIC have its costs and attorneys' fees; and that the Court order such further relief to which FDIC is entitled.

Counter/Plaintiffs FDIC and FDIC-Corporate requests that judgment be entered in its favor against Defendant Searcy M. Ferguson, Jr. as follows:

a. For the unpaid principal and accrued but unpaid interest under the Ferguson Union Notes and the Ferguson First Bank Note;

b. For reasonable attorneys' fees and costs through trial and conditional awards for appeals;

c. For post judgment interest at the highest rate permitted by law; and

d. For such other and further relief to which FDIC and FDIC-Corporate are entitled.

Respectfully submitted,

By:/ s/_____
J. Richard Tubb
State Bar No. 20260400
and
Roy G. Morris
State Bar No. 14500700

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ATTORNEYS FOR FEDERAL DEPOSIT
INSURANCE CORPORATION AS
RECEIVER FOR UNION BANK AND
TRUST AND IN ITS CORPORATE
CAPACITY AS LIQUIDATOR OF FIRST
NATIONAL BANK OF GARLAND

APPENDIX I

EXCERPTS FROM TRIAL TRANSCRIPT (FEBRUARY 26, 1997)

* * *

[p. 487]

[Questions to A. Lydick (FDIC Witness)]

CROSS EXAMINATION

BY MR. GREENBERG:

Q: When were you hired?

A: I beg your pardon?

Q: The question is when were you hired?

A: By whom?

Q: By whoever hired you.

[p. 488]

A: I believe I was contacted on Thursday of last week.

* * *

[p. 490]

Q: What I'm trying to figure out is what you're telling the ladies and gentlemen of the jury is usual and customary from a title examiner's standpoint. And

what you have told them is that you've seen deeds of trust, and you've seen releases, right?

A: That's correct.

Q: And you say that based upon looking at that, the releases don't release the deed of trust?

A: You're factually incorrect. There are two obligers on the deed of trust.

Q: No, I'm not factually incorrect. You testified that these releases don't release the deeds of trusts from a title examiner's standpoint. Isn't that what you've said?

A: That's correct.

Q: Okay. So if that's true, then the deeds of trust are still viable if they didn't release them?

A: That's correct.

Q: And if they're still viable, then whoever owns this deed of trust can foreclose on it?

A: Yes, sir.

[p. 495]

* * *

Q. And what you're telling the ladies and gentlemen of the jury, that because the deed of trust says Searcy M.

Ferguson, Junior Revocable Trust Agreement, that's what it says, isn't it?

A: Yes, sir.

Q: And the release says Searcy M. Ferguson, Junior Revocable Trust Agreement, those two things match, don't they?

A: They do.

Q: . . . there's no question that the release goes to a particular deed of

[p. 496]

trust?

A: The release goes to a particular deed of trust is a correct statement.

Q: . . . who is the maker of the note in the deed of trust?

A: I don't have the note in front of me.

Q: What does it say in the need of trust?

A: There are two grantors.

Q: No. What does it say as to the maker of the note that this deed of trust secures?

A: It says Searcy M. Ferguson, Junior, grantor.

Q: Well, that says Searcy M. Ferguson, Junior, right?

A: It's also signed by Searcy M. Ferguson, Junior, trustee of the Searcy M. Ferguson Revocable Trust Agreement.

* * *

[p. 520]

[Emerson's (FDIC's) Jury Argument]

And then Mr. Bieker gets up here and testifies and tells you about what happened in 1989 as they still--long after the supposed settlement of all his obligations, Mr. Bieker tells you what happened, and about the settlement offer of 225,000 to pay the remaining obligations; and nobody gets up and rebuts it. It's uncontroverted testimony.

* * *

[p. 532]

[Greenberg's (Ferguson's) Jury Argument]

Now, let's talk about what really happened in this case; . . .

In September there was a meeting. Now, Mr. Bieker didn't shoot straight with you when he testified about the meeting, but . . .

[p. 533]

* * *

So, there was a meeting in September. Unlike what Mr. Bieker said, there were only three people present. And there was a different, different version of that meeting. Well, Mr. Bieker said oh, it was just a meeting, and just a meeting. And Mr. Ferguson and Mr. True said well, it was a meeting where Mr. Ferguson disputed this. Mr. Bieker said I don't care about interest. I just want a loan pay off. So I don't know, were they at the same meeting? Probably, but they have different recollections.

Now, does that mean well, it's obvious Mr. Bieker is just telling an untruth? I don't know. Or Mr. True is just lying? I don't know.

* * *

[p.534]

. . . The FDIC would have you believe that these releases in front of you, they didn't release nothing. Now, that's just not credible.

* * *

[p. 535]

. . . here's the key, because the checks were submitted in payment of the notes set forth on the releases. That's what she said. And ladies and gentlemen, she doesn't have anything to gain and nothing to lose in this case. And that's exactly what the releases say.

And remember now, remember, there is not one document signed by Mr. Ferguson and the FDIC that supports what the FDIC is saying in this case, not one. And the

document they want you to rely on, in my opinion was backdated by the FDIC.

* * *

MR. GREENBERG: Now, let me tell you why they backdated this. On November 14th they got $1,700,000 worth of money, and they didn't know,

[p. 538]

according to Mr. Bieker, how much the property sold for until Mrs. Hubbard sent them the closing statement. You remember in Ms. Hubbard's letter, transmitting the money, she said at your request I'm enclosing the seller's statement. Now, ladies and gentlemen, that's the first time the FDIC ever knew what the sales price of the property was. Mr. Ferguson never testified he told them. Mr. Bieker never testified he knew. The only way they learned that, the only way, was from the seller's statement.

But what does this exhibit show? This is what I call their self-serving document that the other lawyer said you only prepare if you're kind of afraid. Well, here's the letter to Mr. Bieker from Ms. Hubbard. I'm sending you a certified copy of the seller's statement you requested dated November 14th, 1988; and that certified copy of the seller's statement, which is Plaintiff's Exhibit 3, clearly shows on here $6,170,000 is the sale price. But they didn't know that before then. They couldn't have known it. There is no evidence that they knew it. Nobody testified that they knew it.

Well, I wonder how $6,170,000 gets put in a

document dated November 9th, 1988. Isn't that something? So the FDIC knew they made a deal. They knew they made a deal with Mr. Ferguson, and in this case they stipulated

[p. 539]

that they made a deal. That was read to you, stipulation number 8, stipulated between FDIC and Mr. Ferguson, an agreement was reached between Plaintiff and FDIC pursuant to which Plaintiff paid a million seven fifty to Defendant FDIC. That's a stipulated fact in this case.

Then what happens? . . . What happened was Mr. Bieker and his superiors said oh, my goodness. We didn't make that deal, did we? We shouldn't have made that deal. Because look here in the Exhibit 3 that they got on the 14th with the checks and the releases. It said there was $3,000,000 escrowed. Well, let's just say we didn't make that deal. And let's get busy and justify that we didn't make that deal. And bam, bow, let's do this document, and that will prove no, we didn't do that deal.

. . . They know they did that.

Do you think the FDIC would do something like that? Well, it looks like they did because what rational, reasonable person is gonna take releases of lien and they say oh, it's got this language in it, this vague language, holder of the note acknowledges payment. That doesn't sound very vague to me.

[p. 540]

* * *

And I think that in the context of somebody saying well, I didn't, I didn't read it, and if I did read it, I didn't read it that way, then why isn't it incumbent upon the FDIC, why isn't it incumbent on the government to come back and say hey, no deal. We don't like that deal. Here's the money back. Let's do a different deal. Why didn't they do that? That's what you do when you make a mistake. Why do you allow these things to be on file at the county clerk's office for all these years, nine years, and now you say that's not right. Well, you can file something. See, it just, it doesn't ring.

APPENDIX J

EXCERPTS FROM TRIAL TRANSCRIPT (FEBRUARY 25, 1997)

* * *

[Questions to Ana Croteau (FDIC Witness)]

[p. 238]

DIRECT EXAMINATION

BY MR. EMERSON:

Q: Ana, would you please state your name for the jury?

A: Ana Croteau.

Q: Who is your present employer?

A: FDIC.

Q: And did you work for the FDIC in Addison, Texas in 1988?

A: Yes, I did.

Q: And what was your position when you left Addison?

A: I was department head of commercial loans.

Q: Were you also a member of the senior credit review committee?

A: Yes.

Q: Throughout the period of 1988?

A: Yes.

Q: And did the senior credit review committee work under the delegation of authority from the FDIC?

A: Yes.

* * *

[p. 242]

Q: . . . Ms. Croteau, did you execute those documents?

A: Yes, sir.

Q: And do you recall specifically executing those documents?

A: No, sir.

Q: Can you tell us what those documents are?

A: Release of liens.

Q: And you executed them in 1988?

A: Yes, sir.

* * *

[p. 252]

MR. GREENBERG: Let me rephrase the question.

Q: The question is did you talk to the notary public that signed her name on this?

A: No, sir.

Q: You didn't?

A: No, sir. . . .

* * *

[p. 253]

Q: But you've never talked to Mr. Ferguson?

A: No.

Q: You've never talked to Mr. Ferguson's lawyers?

A: No.

Q: And you've never talked to Paulette Hubbard?

A: No.

Q: Now, when did you become aware--do you know who Paulette Hubbard is?

A: No.

Q: Do you know now who she is?

A: I'm not sure who she is.

* * *

[p. 259]

Q: Would it be fair to--or did you or did you not rely on other people to make sure that this was an accurate statement of what the release of collateral was?

A: Yes, I would have relied on my staff to have reviewed and concurred that it was what I should be signing.

* * *

Q: Just, one more. When a mistake happens and you get millions of dollars, don't you give back the money you got and say nope, that wasn't the deal?

* * *

A: I'm not sure how--this--I signed these

* * *

[p. 261]

Q: Well, if it's your error that's causing the big problem, isn't the way to solve it to say okay, we got millions of dollars, and we signed all these releases which say what they say, but we didn't mean to sign those releases, so here are the releases back, and here's the money back. Now, let's start over. Isn't that the way to do it?

* * *

[p. 263]

start over or not.

A: No, sir. I would not start over.

* * *

[p. 318]

[Questions to Jim Henderson (FDIC Witness)]

Q: Mr. Henderson, these comparables that I asked you about showing the jury, were these comparables utilized in preparing your appraisal?

A: Yes, they were.

Q: Would you like to just explain to the jury, take them out and explain to the jury very briefly what they demonstrate?

A: Okay. As I had explained, when I appraised this property for the last time in 1995, the--Mr.--the attorney and FDIC asked me to backdate my appraisal to January 1st of 1992.

* * *

[p. 331]

[Questions to Paulette Hubbard (FDIC Witness)]

Q: The red marks on check number 11652 that say Searcy M. Ferguson, you didn't write that?

A: No, sir.

Q: And to your knowledge, no one with Safeco Land Title Company of Dallas wrote that?

A: Correct.

Q: Because it appears that you signed these checks?

A: Yes, sir.

Q: And did you put them in an envelope and mail them or did the FDIC come and get them or do you remember how

* * *

[p. 338]

A. Yes, sir.

Q: And do you clearly tell Mr. Bieker that here's the check, here's a check along with seven releases which must be executed by an authorized representative and acknowledged before a notary public?

A: Yes, sir.

Q: And you got the releases back, and did you then record or cause to be recorded these releases?

A: Yes, sir.

Q: Now, Ms. Hubbard, as a title company closer, do people rely on release of liens that are filed at the courthouse?

A: Yes, sir, as public notice.

* * *

[p. 360]

Q: And the releases clearly say the holder of the note acknowledges payment?

A: Yes, that's what the release says.

Q: And they clearly match?

A: Yes, sir.

Q: And if I'm not mistaken, Ms. Hubbard, any

[p. 361]

instructions you got from--whether it was Mr. Bieker, Mr. Ferguson, his attorneys or an angel, you confirmed with Mr. Bieker and you confirmed with Mr. Ferguson?

A: That is correct.

Q: And you would not and you did not send out the checks and the releases without confirmation with both Mr. Bieker's side and Mr. Ferguson's side?

A: Correct.

* * *

Q: Would it have been your normal practice to have sent the closing statement to the FDIC?

A: No.

Q: Do you know how the FDIC got the closing statement?

* * *

[p. 362]

Q: Well, let's clear it up. . . . how the FDIC got the closing statement was you sent it to them?

A: Exactly.

Q: And they requested it, that's what you say?

A: I say that right there. I see that now.

Q: Okay. So the FDIC, after they made the deal, then they get the documents and the closing statement, right?

A: They got the closing statement at the same time as they got the checks and the releases.

Q: Right. And they never called you and said oh, whoops, that's not the deal. We're not gonna sign these releases saying what they say. They never called you and told you that?

A: That's correct.

Q: So you took their signed, notarized releases and filed them with the county clerk in Kaufman County for everyone to rely on?

A: That's correct.

APPENDIX K

EXCERPTS FROM TRIAL TRANSCRIPT (FEBRUARY 24, 1997)

[Questions to Ron Bieker]

[p. 171]

* * *

BY MR. GREENBERG:

Q: Mr. Bieker, is it true that despite what you've testified here today, you did talk to the title company?

A: The title company called me and told me that the transaction had closed, and they were--

Q: My question, sir, is despite the fact that you told the lawyer that you didn't communicate with the title company, the truth of the matter is you did talk to the title company, did you not?

* * *

Q: Is that the answer, yes?

A: Would you ask the question again please?

Q: Sure, sure, Mr. Bieker. On November 14, 1988 you talked to the title company, did you not?

A: Yes, I did.

* * *

[p. 172]

Q: Well, do you deny, sir, that in addition to the phone call, she wrote you a letter?

A: She wrote me a letter, yes.

Q: And you got it the same day?

A: Yes.

Q: And the letter clearly instructs you to cause the releases to be signed and notarized today.

A: Yes.

Q: Correct?

A: Yes.

* * *

[p. 173]

Q: Now, when you got the letter, and it said execute the releases before a notary and return them today, what did you think Ms. Hubbard wanted you to do?

A: Execute the releases and have them notarized today, the same day.

Q: Now, is it true, Mr. Bieker, there wasn't anybody putting a gun to your head making you execute

anything?

A: That's correct.

Q: Wasn't anybody putting a gun to anybody else with the FDIC making them do anything?

A: Correct.

* * *

Q: Well, I'm a little confused. You have authority to say no deal, but you don't have authority to say deal, is that right?

A: That's correct.

Q: Well, did you tell Paulette Hubbard, after you got

[p. 174]

the letter, no deal, Paulette. I've seen the releases. It's no deal. That's not the deal.

A: No, I didn't see the releases.

Q: I thought you told the jury a minute ago they were enclosed with the checks?

A: They were. When we received the package, I took a look at the checks, saw the releases of lien. I instructed my technician, a staff member, to handle getting the proper delegated authority to execute the release of liens.

Q: Well, what you mean then, Mr. Bieker, is you didn't take time to look at the release. Is that what you're telling us?

A: That's correct.

Q: But they were there, available. Nobody is trying to secret anything from you, right?

A: That's correct.

* * *

[p. 175]

Q: So the question is, if you'd have read the document and known that it wasn't the deal you made, you wouldn't have forwarded it on for execution, would you?

A: Correct.

Q: But you did?

A: Correct.

* * *

[p. 177]

Q: And Ms. Hubbard's letter to you says our check number 11652, in the amount of, representing loan pay off due on Searcy M. Ferguson, Junior Trust account, right?

A: Yes.

Q: And then it says along with seven releases of lien, and that's one of them, right, Exhibit 8 is one of them?

A: Yes.

Q: Which must be executed by an authorized representative of the FDIC and acknowledged before a notary public, right?

A: Yes.

* * *

[p. 186]

Q: Okay. Now, there is no question in your mind, is there, is that the September 21st, '88 letter that was written to you by Mr. Shackelford was an offer to settle the FDIC indebtedness?

A: Yes, it was.

Q: All the indebtedness?

A: Yes.

Q: Whatever that was?

A: Yes.

* * *

[p. 188]

Q: Did I understand you to tell the lawyer that you don't know how 2813 got put on there?

A: That's correct.

Q: Did you put it on there?

A: No, I did not.

Q: Who did you authorize to put that on there.

A: I didn't authorize anyone to put that on there.

Q: Did you write there Searcy M. Ferguson?

A: No.

Q: Who did you authorize to write that?

A: I didn't authorize anyone to.

Q: Well, do you agree that these checks were in the possession of the FDIC until they were negotiated?

A: Yes.

* * *

[p. 189]

Q: Mr. Ferguson never had possession of the checks, right?

A: Yes.

Q: So either the FDIC or Safeco wrote these things on the checks, not Mr. Ferguson, right?

A: Correct.

Q: And are you telling the jury that the FDIC didn't write that on there or that you just don't know whether they did or not?

A: I don't know if they did or not.

* * *

[p. 191]

A: They prepared — well, my assumption. The releases were not prepared by the FDIC. The releases were provided by Safeco Land Title.

Q: Well, the checks weren't prepared by the FDIC, and you gladly accepted that, right?

A: That's right.

* * *

[p. 228]

[Question to John Shackelford (FDIC Witness)]

Q: Okay. Now, when you made an offer to Mr. Bieker, you put it in writing, didn't you?

A: Yes.

* * *

[p. 229]

Q: Did you ever make an offer to Mr. Bieker that you didn't put in writing, just kind of one day you called him and said say, I'm not going to put this in writing, but here's an offer?

A: I don't recall.

* * *

Q: Okay. I'm talking about this transaction and these circumstances in 1988.

A: Prudence would tell you to put it in writing.

* * *

Q: If you had made an offer to Mr. Bieker, would you have talked to either Mr. Ferguson or Mr. True before you made it?

* * *

[p. 230]

A: I'm sure I would have talked to Mr. True.

Q: I'm not clear, so that's why I'm asking this question, do you have an independent recollection of having a conversation with Mr. Bieker in November of 1988?

A: No.

* * *

[p 231]

Q: Let me ask you to look at Exhibit--a blowup of Exhibit Number 9. Can you see this?

A: Yes, sir.

Q: Is that, as far as you know, was it, in 1988, an acceptable, proper form of release, when you're paying off a note and getting a lien release, prepared--

* * *

A: Correct.

Q: The whole thing is correct or?

A: Well, the release of lien is--that particular form would be one that's customarily used or often times

[p. 232]

used to effect a release of lien encumbering a piece of property.

Q: And extinguishing a note. I mean that's what this lien does, doesn't it? That's what this release of lien does, does it not?

* * *

A: I'd have to read the specific language of the release of lien.

Q: Okay. Pardon me for giving you this big thing, but it's easier than going to find the--

A: Based upon this release of lien, the note would be extinguished in addition to the lien itself.

Q: I mean you deal in real estate, do you not?

A: As an attorney.

Q: That's one of your expertises?

A: Right.

* * *

[p. 233]

REDIRECT EXAMINATION

BY MR. EMERSON:

Q: Mr. Shackelford, with regard to the release of lien that you were just shown, if an agreement had been reached to the effect that liens would be released but the note would not be released that was secured by the lien, then that document would not be correctly drafted, is that true?

A: That document reflects that the owner of the note is releasing the note and extinguishing the debt entirely.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NUMBER
3:91-CV-2494-D

SEARCY M. FERGUSON, JR.,	)
	)
v.	)
	)
FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for the Union Bank and Trust,	)

AFFIDAVIT OF HOWARD CONINE

STATE OF TEXAS *
COUNTY OF DALLAS *

BEFORE ME, the undersigned authority, on this day personally appeared Howard Conine, who, after by me duly sworn, stated on oath as follows:

1. My name is Howard Conine, and I am over the age of twenty-one (21) years and I am competent and capable to make this Affidavit and to testify herein. I have never been convicted of a crime and have personal knowledge of the facts

set forth and every statement herein made and they are all true and correct.

2. I was employed at Union Bank and Trust between 1984 and May 1988 as Cashier, and I was, additionally, Secretary to the Board of Directors. I was familiar with the bank's business records and documents as part of my job responsibility, and I oversaw the operations of the bank on a daily basis.

3. I have knowledge of a $1,365,000 line of credit note executed by Searcy M. Ferguson, Jr. This was the bank's legal lending limit to an individual borrower, and was not to be exceeded. I believe Mr. Ferguson also continued to execute note renewals on all underlying notes covered by the master line of credit. I believe some of Fergusons' notes had reduced outstanding balances due to payments. To determine the correct outstanding balance on Ferguson's line of credit note at the time the bank was closed on May 8, 1988, the best evidence is the bank's official ledger book. Mr. Ferguson told me he had subpoenaed the bank's ledger book from the FDIC, and that the FDIC had not produced.

4. Reference is made to a sale of 56 acres by Searcy M. Ferguson, Jr. in 1986 for $775,000. I recall this money was applied on several of Ferguson's various notes. However, I remember a large note in the sum of $375,000 was paid off in full at that time.

5. Reference is made to an attached bank examination sheet which shows Ferguson's true line of credit debt on 3-14-88 as $1,010,000. I note that this is

about the particular amount that I believed to be the correct balance on Ferguson's line of credit note. Ferguson's debt was very confusing and difficult to figure out. I don't believe a young credit analyst would comprehend of correctly reconstruct all the multitude of transactions. The balance of Ferguson's debt changed all the time, and anyone would have been totally confused.

6. I strongly believe Union Bank's board made a mistake when it released Ferguson's 50% Suffolk liens to Elizabeth Smith in December 1987. The Releases of the Suffolk Deeds of Trust were mailed by the bank's president to Elizabeth Smith on about December 17, 1987. I believed at the time that the bank's "alleged" determination that Ferguson had "no authority" to encumber his 50% interest in the Suffolk property was very murky and against plain common horsesense. Perhaps the bank president was motivated by Mrs. Smith being the controlling bank stockholder. Frankly, I believed Smith should have paid the Suffolk mortgage liens which she had assumed in her divorce AID with Mr. Ferguson. I understand Mrs. Smith was very pleased when she received the bank releases. She got a windfall.

7. As to the $60,000 bonus paid the bank president at the December 8, 1987, Ferguson wrote a letter received by the bank a few days later expressing his objections. The board of directors had approved the Suffolk releases to Mrs. Smith at the same meeting. We all knew Ferguson's Suffolk collateral exceeded the aggregate of all of Ferguson's loans. Surely Ferguson's 50% was a serious matter, and the board was probably wanting not to make Mrs. Smith mad.

8. The circumstances surrounding Ferguson's line of credit note with the numerous outside participations was particularly confusing, especially in light of the numerous debits and credits along with Ferguson's periodic, partial payments. The FDIC had accrued the bank's past president doctored documents and duplicate closing statements plus improper loans to relatives. Ferguson's records could have been left in disarray. I believe any FDIC credit analyst not completely supplied with proper participation explanations, could easily make clerical mistakes and errors in his calculations. Also, confusing the FDIC were loans to Ferguson, Sr. and Baltic Royalty Corp., secured 100% by Certificates of Deposit. I believe these loans were all paid. Some of these notes might have been duplicates to some of Ferguson's notes due to the line of credit limit. Proceeds from these loans might not have been properly credited by Buchwald, the bank's president at the time, and Mr. Ferguson might not have received proper credit.

9. I have personally examined each of the eight Releases of Lien instruments executed by Ana Croteau, a commercial department head of the FDIC and a senior member of the FDIC Credit Committee. The exact notes dated and accurately described on each of the Release instruments are the exact same notes the FDIC is suing Mr. Ferguson. There is absolutely no confusion about the described notes being acknowledged as paid in full by the FDIC. There were no other notes in the bank's records. The eight Releases specifically state "Holder of the note acknowledges its payment and releases the property from the lien." I believe that covenant is plain and clear in its language meaning. I also have seen copies of the title

company checks paid to the FDIC in exchange for the FDIC Release instruments. My opinion is that Ferguson's notes at issue were "fully paid" as acknowledged by the FDIC.

10. It is common knowledge that the FDIC employees and officers operate under policies, rules and regulations. I believe the FDIC calls it a liquidation credit manual. The manual says the FDIC must negotiate in good faith. I believe that an FDIC "release" instrument cannot be executed without prior FDIC Credit Committee approval if the amount is over $25,000. The FDIC had a credit manual in 1988. They have one today. FDIC employees just can't sign releases without prior Credit Committee approval. I am completely convinced that the FDIC officer signing the FDIC releases had prior FDIC Credit Committee approval. The FDIC story just does not wash. Where was Ferguson's promised discount? Where were Ferguson's promised interest rate concessions? The FDIC's version of the facts does not make any sense from Ferguson's standpoint. I further fail to understand how the title company or Ferguson could know or be responsible for an FDIC officer's actions or Ana Croteau, a senior member of the FDIC Credit Committee, not having proper legal authority. Ferguson and the title company relinquished enormous sums of money in exchange for these releases. After all, did not the title company letter tell the FDIC not to cash the title company's checks until each of the releases had been properly executed by someone with authority and returned to the title company.

FURTHER AFFIANT SAITH NOT.

/s/_____
Howard Conine

SWORN TO AND SUBSCRIBED BEFORE ME, this the 18th day of April, 1996.

/s/_____
Di Halton
Notary Public in and for the State of Texas

APPENDIX M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

Case Number: CA3:91-CV-2494-D

SEARCY M. FERGUSON, JR.,
Plaintiff/Counter-Defendant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver of the Union Bank and Trust, and THE UNITED STATES OF AMERICA,
Defendant-Counter-Plaintiff.

SUBPOENA IN A CIVIL CASE

TO: AN AUTHORIZED REPRESENTATIVE OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CAPACITY AS RECEIVER OF THE UNION BANK & TRUST, by serving its attorney of record, J. Richard Tubb, FDIC, 5080 Spectrum Drive, Suite 400 West, Dallas, Texas 75248.

X YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.PLACE OF TESTIMONY:

Honorable Sidney A. Fitzwater
U.S. District Court, Northern District of Texas
1100 Commerce Street
Dallas, Texas 75242

COURTROOM: 15th Floor

DATE AND TIME: June 28, 1993
9:00 a.m.

XX YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects);

SEE ATTACHED.

PLACE:

Courtroom, 15th Floor
Honorable Sidney A. Fitzwater
1100 Commerce Street
Dallas, Texas 75242

DATE AND TIME: June 28, 1993 9:00 a.m.

DATE: June 18, 1993

ISSUING OFFICER SIGNATURE
AND TITLE
/s/_____
Robert M. Greenberg,
Attorney for Plaintiff/Counter-Defendant
1330 River Bend Park, Suite 850, Dallas, TX 75247

Subpoena - Dated 6/18/93

DUCES TECUM

1. Union Bank & Trust's original trial balance on Searcy M. Ferguson, Jr.;

2. Union Bank & Trust's general ledger on Searcy M. Ferguson, Jr.;

3. The original minutes of the Board of Director's meeting of Union Bank & Trust in September, October and November, 1985, and October, November and December, 1987, and January, 1988;

4. Union Bank & Trust's original deposit slip or other banking record showing that $1,365,000.00 was funded into the account of Searcy M. Ferguson, Jr.

APPENDIX N

SAFECO LAND TITLE
12900 PRESTON ROAD
SUITE 208
DALLAS, TEXAS 75230

November 14, 1988 HAND DELIVERY

Mr. Ron Bieker
Federal Deposit Insurance Corporation
14651 Dallas Parkway, Suite 200
Dallas, Tx. 75240

Re: Our File Number 87-68638 LBJ/psh
Ferguson/NHT

Dear Mr. Bieker:

In connection with the above captioned transaction, I enclose herein the following:

1) Our check #11652 in the amount of $1,583,327.04, payable to Federal Deposit Insurance as Receiver for Union Bank & Trust Company, representing loan payoff due on Searcy M. Ferguson, Jr. Trust account, along with seven (7) Releases of Lien which must be executed by an authorized representative of the FDIC and acknowledged before a Notary Public.

2) Our check #11651 in the amount of $69,681.95 payable to Federal Deposit Insurance Corporation as Receiver for Union Bank & Trust Company, representing loan payoff due on Searcy M. Ferguson, III Trust account, along with one (1) Release of Lien which must be executed by an authorized representative of the FDIC and acknowledged before a Notary Public.

3) Our check #11659 in the amount of $74,293.52 payable to Federal Deposit Insurance Corporation as Receiver for Union Bank & Trust Company, representing loan payoff due on Sawnee Ferguson Trust account.

4) Certified copy of Seller's Statement you requested.

As we discussed on the telephone a few moments ago, please cause these releases to be signed and notarized today. When they are ready, give me a call and I will send my messenger back to pick them up along with the Note marked "PAID" for the Sawnee Ferguson Trust Note.

If you have any questions or require anything further from us with regard to this matter, please call me immediately.

Very truly yours,

/s/_____
Paulette Hubbard
Vice President

/ps

Enclosures

APPENDIX O

CHECKS ISSUED TO FDIC AS RECEIVER DATED NOVEMBER 14, 1988

SAFECO LAND TITLE OF DALLAS
ESCROW ACCOUNT
POLICY ISSUING AGENT 2813
12900 PRESTON RD., SUITE 208
DALLAS, TEXAS 75230 SEARCY M. FERGUSON

87-68638 LBJ/psh
CENTRE NATIONAL BANK (214)392-7400 4100 ALPHA ROAD FARMERS BRANCH, TEXAS 75234

11652

November 14, 19 88

88-1397/1119

PAY **One million, five hundred eighty three thousand, three hundred/ twenty seven and 04/100**** DOLLARS $1,583,327.04*

TO THE ORDER OF FEDERAL DEPOSIT INSURANCE CORPORATION
as Receiver for
Union Bank & Trust Company

SAFECO LAND TITLE OF DALLAS
ESCROW ACCOUNT
VOID AFTER 90 DAYS

Paulette Hubbard

⑈011652⑈ ⑆111913976⑆ 0000356⑈ ⑈0158332704⑈

DELUXE CHECK PRINTERS

SAFECO LAND TITLE OF DALLAS
ESCROW ACCOUNT
POLICY ISSUING AGENT 2813
12900 PRESTON RD., SUITE 208
DALLAS, TEXAS 75230 SEARCY M. FERGUSON, III TRUST

87-68638 LBJ/psh
CENTRE NATIONAL BANK (214)392-7400 4100 ALPHA ROAD FARMERS BRANCH, TEXAS 75234

11651

November 14, 19 88

88-1397/1119

PAY **Sixty nine thousand, six hundred eighty one and 95/100** DOLLARS $*69,681.95**

TO THE ORDER OF FEDERAL DEPOSIT INSURANCE CORPORATION
as Receiver for
Union Bank & Trust Company

SAFECO LAND TITLE OF DALLAS
ESCROW ACCOUNT
VOID AFTER 90 DAYS

Paulette Hubbard

⑈011651⑈ ⑆111913976⑆ 0000356⑈ ⑈0006968195⑈

DELUXE CHECK PRINTERS

SAFECO LAND TITLE OF DALLAS
ESCROW ACCOUNT
POLICY ISSUING AGENT 2813
12900 PRESTON RD., SUITE 208
DALLAS, TEXAS 75230 SAWNEE FERGUSON TRUST

87-68638 LBJ/psh
CENTRE NATIONAL BANK (214)392-7400 4100 ALPHA ROAD FARMERS BRANCH, TEXAS 75234

11650

November 14, 19 88

88-1397/1119

AY *Seventy four thousand, two hundred ninety three and 52/100** DOLLARS $*74,293.52**

TO THE ORDER OF FEDERAL DEPOSIT INSURANCE CORPORATION
as Receiver for
Union Bank & Trust Company

SAFECO LAND TITLE OF DALLAS
ESCROW ACCOUNT
VOID AFTER 90 DAYS

Paulette Hubbard

⑈011650⑈ ⑆111913976⑆ 0000356⑈ ⑈0007429352⑈

APPENDIX P

RELEASE OF LIEN

STATE OF TEXAS
COUNTY OF KAUFMAN

Date: November 14, 1988

Note Date: November 21, 1986

Original Amount: $300,000.00

Maker: Searcy M. Ferguson, Jr. Revocable Trust Agreement

Payee: UNION BANK & TRUST OF DALLAS

Holder of Note and Lien: FEDERAL DEPOSIT INSURANCE CORPORATION

Holder's Mailing Address (including county):

P.O. Box 802090, Dallas, Dallas County, Texas 75380

Note and Lien Are Described in the Following Documents, Recorded in:

> Deed of Trust filed 12/1/86, recorded in Volume 874, Page 243, Deed of Trust Records, Kaufman County, Texas.

Property (including any improvements) Subject to Lien:

See Exhibit "A" attached hereto and made a part hereof for all intents and purposes

EXECUTED AS OF THE DATE FIRST ABOVE WRITTEN.

FEDERAL DEPOSIT INSURANCE CORPORATION
Receiver for Union Bank & Trust of Dallas

BY:/s/_____
Name Printed: Ana Croteau
Title: Department Head - Commercial

STATE OF TEXAS
COUNTY OF Dallas

This instrument was acknowledged before me on the 15th day of November, 1988,

by /s/_____
Ana Croteau,

FEDERAL DEPOSIT INSURANCE CORPORATION
a United States corporation, on behalf of said corporation.

/s/_____
Debra Denise Reish
Notary Public, State of Texas
Notary's name (printed): DEBRA DENISE REISH
Notary's commission expires: 10-26-91

PREPARED IN THE LAW OFFICE OF:
Beasley & Pulliam, PC
12900 Preston Road, Suite 303
Dallas, Tx. 75230

RELEASE OF LIEN

STATE OF TEXAS
COUNTY OF KAUFMAN

Date: November 14, 1988

Note Date: June 30, 1981

Original Amount: No amount stated

Maker: Searcy M. Ferguson, Jr.

Payee: Union Bank & Trust of Dallas

Holder of Note and Lien: FEDERAL DEPOSIT INSURANCE CORPORATION

Holder's Mailing Address (including county):

P.O. Box 802090, Dallas, Dallas County, Texas 75300

Note and Lien Are Described in the Following Documents, Recorded in:

> Deed of Trust dated 6/30/81, filed 6/17/83, recorded in Volume 272, Page 206, Deed of Trust Records, Kaufman County, Texas.

Property (including any improvements) Subject to Lien:

See Exhibit "A" attached hereto and made a part of hereof for all intents and purposes.

EXECUTED AS OF THE DATE FIRST ABOVE WRITTEN.

FEDERAL DEPOSIT INSURANCE CORPORATION
Receiver of Union Bank & Trust of Dallas

BY:/s/_____
Name Printed: Ana Croteau
Title: Department Head - Commercial

STATE OF TEXAS
COUNTY OF Dallas

This instrument was acknowledged before me on the 15th day of November, 1988,

by /s/_____
Ana Croteau,

FEDERAL DEPOSIT INSURANCE CORPORATION
a United States corporation, on behalf of said corporation.

/s/_____
Debra Denise Reish
Notary Public, State of Texas
Notary's name (printed): DEBRA DENISE REISH
Notary's commission expires: 10/26/91

PREPARED IN THE LAW OFFICE OF:
Beasley & Pulliam, PC
12900 Preston Road, Suite 303
Dallas, TX 75230

RELEASE OF LIEN

STATE OF TEXAS
COUNTY OF KAUFMAN

Date: November 14, 1988

Note Date: 12/2/86

Original Amount: $45,000.00

Maker: Searcy M. Ferguson, Jr.
Revocable Trust Agreement

Payee: Union Bank & Trust of Dallas

Holder of Note and Lien: FEDERAL DEPOSIT
INSURANCE CORPORATION

Holder's Mailing Address (including county):

P.O. Box 802090, Dallas, Dallas County, Texas 75300

Note and Lien Are Described in the Following Documents, Recorded in:

Deed of Trust recorded in Volume 874, Page 754, Deed of Trust Records, Kaufman County, Texas.

Property (including any improvements) Subject to Lien:

See Exhibit "A" attached hereto and made a part of hereof for all intents and purposes.

EXECUTED AS OF THE DATE FIRST ABOVE WRITTEN.

FEDERAL DEPOSIT INSURANCE CORPORATION
Receiver of Union Bank & Trust of Dallas

BY:/s/_____
Name Printed: Ana Croteau
Title: Department Head - Commercial

STATE OF TEXAS
COUNTY OF Dallas

This instrument was acknowledged before me on the 15th day of November, 1988,

by /s/_____
Ana Croteau,

FEDERAL DEPOSIT INSURANCE CORPORATION
a United States corporation, on behalf of said corporation.

/s/_____
Debra Denise Reish
Notary Public, State of Texas
Notary's name (printed): DEBRA DENISE REISH
Notary's commission expires: 10/26/91

PREPARED IN THE LAW OFFICE OF:
Beasley & Pulliam, PC
12900 Preston Road, Suite 303
Dallas, TX 75230

RELEASE OF LIEN

STATE OF TEXAS
COUNTY OF KAUFMAN

Date: November 14, 1988

Note Date: December 24, 1986

Original Amount: $100,000.00

Maker: Searcy M. Ferguson, Jr.
Revocable Trust Agreement

Payee: Union Bank & Trust of Dallas

Holder of Note and Lien: FEDERAL DEPOSIT
INSURANCE CORPORATION

Holder's Mailing Address (including county):

P.O. Box 802090, Dallas, Dallas County, Texas 75300

Note and Lien Are Described in the Following Documents, Recorded in:

> Deed of Trust filed 1/5/87 recorded in Volume 878, Page 1, Deed of Trust Records, Kaufman County, Texas.

Property (including any improvements) Subject to Lien:

See Exhibit "A" attached hereto and made a part of hereof for

all intents and purposes.

EXECUTED AS OF THE DATE FIRST ABOVE WRITTEN.

FEDERAL DEPOSIT INSURANCE CORPORATION
Receiver of Union Bank & Trust of Dallas

BY:/s/_____
Name Printed: Ana Croteau
Title: Department Head - Commercial

STATE OF TEXAS
COUNTY OF Dallas

This instrument was acknowledged before me on the 15th day of November, 1988,

by /s/_____
Ana Croteau,

FEDERAL DEPOSIT INSURANCE CORPORATION
a United States corporation, on behalf of said corporation.

/s/_____
Debra Denise Reish
Notary Public, State of Texas
Notary's name (printed): DEBRA DENISE REISH
Notary's commission expires: 10/26/91

PREPARED IN THE LAW OFFICE OF:
Beasley & Pulliam, PC
12900 Preston Road, Suite 303
Dallas, TX 75230

RELEASE OF LIEN

STATE OF TEXAS
COUNTY OF KAUFMAN

Date: November 14, 1988

Note Date: 1/30/87

Original Amount: $100,000.00

Maker: Searcy M. Ferguson, Jr.
Revocable Trust Agreement

Payee: Union Bank & Trust of Dallas

Holder of Note and Lien: FEDERAL DEPOSIT
INSURANCE CORPORATION

Holder's Mailing Address (including county):

P.O. Box 802090, Dallas, Dallas County, Texas 75300

Note and Lien Are Described in the Following Documents, Recorded in:

> Deed of Trust filed 2/4/87 recorded in Volume 881, Page 229, Deed of Trust Records, Kaufman County, Texas

Property (including any improvements) Subject to Lien:

See Exhibit "A" attached hereto and made a part of hereof for

all intents and purposes.

EXECUTED AS OF THE DATE FIRST ABOVE WRITTEN.

FEDERAL DEPOSIT INSURANCE CORPORATION
Receiver of Union Bank & Trust of Dallas

BY:/s/_____
Name Printed: Ana Croteau
Title: Department Head - Commercial

STATE OF TEXAS
COUNTY OF Dallas

This instrument was acknowledged before me on the 15th day of November, 1988,

by /s/_____
Ana Croteau,

FEDERAL DEPOSIT INSURANCE CORPORATION
a United States corporation, on behalf of said corporation.

/s/_____
Debra Denise Reish
Notary Public, State of Texas
Notary's name (printed): DEBRA DENISE REISH
Notary's commission expires: 10/26/91

PREPARED IN THE LAW OFFICE OF:
Beasley & Pulliam, PC
12900 Preston Road, Suite 303
Dallas, TX 75230

RELEASE OF LIEN

STATE OF TEXAS
COUNTY OF KAUFMAN

Date: November 14, 1988

Note Date: 11/5/86

Original Amount: $100,000.00

Maker: Searcy M. Ferguson, Jr.
Revocable Trust Agreement and Searcy M. Ferguson, Jr., Individually

Payee: Union Bank & Trust of Dallas

Holder of Note and Lien: FEDERAL DEPOSIT INSURANCE CORPORATION

Holder's Mailing Address (including county):

P.O. Box 802090, Dallas, Dallas County, Texas 75300

Note and Lien Are Described in the Following Documents, Recorded in:

> Deed of Trust filed 11/18/86, recorded in Volume 873, Page 282, Deed of Trust Records, Kaufman County, Texas.

Property (including any improvements) Subject to Lien:

See Exhibit "A" attached hereto and made a part of hereof for all intents and purposes.

EXECUTED AS OF THE DATE FIRST ABOVE WRITTEN.

FEDERAL DEPOSIT INSURANCE CORPORATION
Receiver of Union Bank & Trust of Dallas

BY:/s/_____
Name Printed: Ana Croteau
Title: Department Head - Commercial

STATE OF TEXAS
COUNTY OF Dallas

This instrument was acknowledged before me on the 15th day of November, 1988,

by /s/_____
Ana Croteau,

FEDERAL DEPOSIT INSURANCE CORPORATION
a United States corporation, on behalf of said corporation.

/s/_____
Debra Denise Reish
Notary Public, State of Texas
Notary's name (printed): DEBRA DENISE REISH
Notary's commission expires: 10/26/91

PREPARED IN THE LAW OFFICE OF:
Beasley & Pulliam, PC
12900 Preston Road, Suite 303
Dallas, TX 75230

RELEASE OF LIEN

STATE OF TEXAS
COUNTY OF KAUFMAN

Date: November 14, 1988

Note Date: November 21, 1986

Original Amount: $300,000.00

Maker: Searcy M. Ferguson, Jr.
Revocable Trust Agreement

Payee: Union Bank & Trust of Dallas

Holder of Note and Lien: FEDERAL DEPOSIT
INSURANCE CORPORATION

Holder's Mailing Address (including county):

P.O. Box 802090, Dallas, Dallas County, Texas 75300

Note and Lien Are Described in the Following Documents, Recorded in:

> Deed of Trust filed 12/1/86, recorded in Volume 874, Page 243, Deed of Trust Records, Kaufman County, Texas.

Property (including any improvements) Subject to Lien:

See Exhibit "A" attached hereto and made a part of hereof for

all intents and purposes.

EXECUTED AS OF THE DATE FIRST ABOVE WRITTEN.

FEDERAL DEPOSIT INSURANCE CORPORATION
Receiver of Union Bank & Trust of Dallas

BY:/s/_____
Name Printed: Ana Croteau
Title: Department Head - Commercial

STATE OF TEXAS
COUNTY OF Dallas

This instrument was acknowledged before me on the 15th day of November, 1988,

by /s/_____
Ana Croteau,

FEDERAL DEPOSIT INSURANCE CORPORATION
a United States corporation, on behalf of said corporation.

/s/_____
Debra Denise Reish
Notary Public, State of Texas
Notary's name (printed): DEBRA DENISE REISH
Notary's commission expires: 10/26/91

PREPARED IN THE LAW OFFICE OF:
Beasley & Pulliam, PC
12900 Preston Road, Suite 303
Dallas, TX 75230

RELEASE OF LIEN

STATE OF TEXAS
COUNTY OF KAUFMAN

Date: November 14, 1988

Note Date: 2/17/87

Original Amount: $100,000.00

Maker: Searcy M. Ferguson, Jr.
Revocable Trust Agreement

Payee: Union Bank & Trust of Dallas

Holder of Note and Lien: FEDERAL DEPOSIT
INSURANCE CORPORATION

Holder's Mailing Address (including county):

P.O. Box 802090, Dallas, Dallas County, Texas 75300

Note and Lien Are Described in the Following Documents, Recorded in:

> Deed of Trust filed 2/12/87 recorded in Volume 883, Page 250, Deed of Trust Records, Kaufman County, Texas.

Property (including any improvements) Subject to Lien:

See Exhibit "A" attached hereto and made a part of hereof for

all intents and purposes.

EXECUTED AS OF THE DATE FIRST ABOVE WRITTEN.

FEDERAL DEPOSIT INSURANCE CORPORATION
Receiver of Union Bank & Trust of Dallas

BY:/s/_____
Name Printed: Ana Croteau
Title: Department Head - Commercial

STATE OF TEXAS
COUNTY OF Dallas

This instrument was acknowledged before me on the 15th day of November, 1988,

by /s/_____
Ana Croteau,

FEDERAL DEPOSIT INSURANCE CORPORATION
a United States corporation, on behalf of said corporation.

/s/_____
Debra Denise Reish
Notary Public, State of Texas
Notary's name (printed): DEBRA DENISE REISH
Notary's commission expires: 10/26/91

PREPARED IN THE LAW OFFICE OF:
Beasley & Pulliam, PC
12900 Preston Road, Suite 303
Dallas, TX 75230

APPENDIX Q

FDIC
Federal Deposit Insurance Corporation
Division of Liquidation
P.O. Box 602090
Dallas, Texas 75380

May 7, 1988

FERGUSON, SEARCY M. JR.
5950 BERSHIRE LANE STE 1650
DALLAS, TX 75225

FERGUSON, SEARCY M. JR.
Asset No.: 301067282
Bank No.: 2813
Maturity Date: 12/21/87 Orig. Date: 12/02/88
Interest Rate: 12.5000 Orig. Amt.: 45,000.00
Bal. at Closing: 45,000.00

2813 ASSET NO. 30167282

SUBJECT: LQMO-404, Addison Consolidated Office
2813, Union Bank & Trust of Dallas
Dallas, Texas - In Liquidation
Notification Letter

Dear Sir or Madam:

On May 05, 1988, the Banking Commissioner of the State of Texas closed Union Bank & Trust of Dallas, Dallas, Texas, and appointed the Federal Deposit Insurance Corporation (FDIC) as Receiver. Under the laws of the State of Texas, the Receiver is charged with the duty of winding the affairs of the Bank as expeditiously as possible. In order to achieve its goal, the Receiver is given the legal right to disaffirm executory undertakings in which the Bank was involved and to terminate ongoing business transactions to which the Bank was a party.

The Bank's records indicate that you may be a party to a loan agreement, the terms of which required the Bank to extend you additional credit or fund additional monies. It is the Receiver's view that this agreement is executory in nature. We therefore hereby inform you that the Receiver has elected to disaffirm said agreement and will not be advancing any additional funds under the loan agreement.

The Receiver strongly suggests that you immediately take any action necessary to protect your interests. You may wish to arrange for the establishment of a new line of credit with another financial institution. Please contact the Receiver if there is any information or documentation you will require in order to facilitate any action you intend to take along these lines.

The FDIC requires that you adhere to the original written terms of you loan agreement. We request that you continue to make you payments on or before the due dates, making you check payable to:

FDIC Letter to Searcy Ferguson - 5/7/88

Federal Department Insurance Corporation
Bank Number 2813
P.O. Box 802424
Dallas, Texas 75380-2424

The amount shown below is not the payoff amount. For a payoff on a given date, please contact our office at 214-239-3317. You should be advised that collect calls will not be accepted. In all correspondence or telephone conversations, please make reference to the bank name, bank number 2813, and the asset number as indicated above.

If you would like to discuss a matter in person with FDIC personnel, our Addison consolidated Office is located at 14651 Dallas Parkway, Suite 200 Addison, Texas 75240. For better service, please make an appointment in advance.

Should you have any questions, please contact this office.

Very truly yours,

/s/_____
Donald G. Watts
Bank Liquidation Specialist-In-Charge

APPENDIX R

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed: January 26, 1996]

Nos. 94-11106, 94-11107

[EXCERPTED]

ERGO SCIENCE, INC.,
Plaintiff-Appellee,

v.

DONN D. MARTIN, et al.
Defendants,

ELITE THERAPEUTICS, INC.,
Defendant-Appellant,

v.

HOMER WEST, et al.
Claimants-Appellees.

OPINION

[Keynote 2. Doctrine of "judicial estoppel" prevents party from asserting position in legal proceeding that is contrary to position previously taken in same or some earlier proceeding.]

* * *

DISAVOWAL OF INTEREST IN FUND

. . . Rather, the question is one of procedure in the federal courts: Can a federal district judge rely upon statements made by counsel in open court renouncing a specific claim? This question does not implicate Texas waiver law at all, but strikes at the very core of protecting the integrity of the judicial process and the discretion of the district court.

Viewed in this light, the issue is more akin to judicial estoppel. The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or earlier proceeding. *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1565, 128 L.Ed. 2d 211 (1994). We recognize the applicability of this doctrine in this circuit because of its laudable policy goals. The doctrine prevents internal inconsistency, precludes litigants from "playing fast and loose" with the courts, and prohibits parties from deliberately changing positions based upon the exigencies of the moment. *Id.*

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